

VOLUNTARY ENVIRONMENTAL CLEANUP AND ECONOMIC REDEVELOPMENT ACT OF 1993

Y 4. P 96/10: S. HRG. 103-180

Voluntary Environmental Cleanup and...

HEARING BEFORE THE SUBCOMMITTEE ON SUPERFUND, RECYCLING, AND SOLID WASTE MANAGEMENT OF THE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS UNITED STATES SENATE ONE HUNDRED THIRD CONGRESS

FIRST SESSION

ON

S. 773

A BILL TO REQUIRE THE ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY TO ESTABLISH A PROGRAM TO ENCOURAGE VOLUNTARY ENVIRONMENTAL CLEANUP OF FACILITIES TO FOSTER THEIR ECONOMIC REDEVELOPMENT, AND FOR OTHER PURPOSES

JUNE 17, 1993

Printed for the use of the Committee on Environment and Public Works



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VOLUNTARY ENVIRONMENTAL CLEANUP AND ECONOMIC REDEVELOPMENT ACT OF 1993

THURSDAY, JUNE 17, 1993

**U.S. SENATE,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
SUBCOMMITTEE ON SUPERFUND, RECYCLING, AND
SOLID WASTE MANAGEMENT,
*Washington, D.C.***

The subcommittee met, pursuant to notice, at 10:00 a.m. in room 406, Dirksen Senate Office Building, Hon. Frank R. Lautenberg [chairman of the subcommittee] presiding.

Present: Senators Lautenberg and Boxer.

OPENING STATEMENT OF HON. FRANK R. LAUTENBERG, U.S. SENATOR FROM THE STATE OF NEW JERSEY

Senator LAUTENBERG. Good morning. My apologies. I try not to start subcommittee hearings late, but I was delayed on the Senate Floor.

I'm delighted to have a chance to have a hearing on my legislation, the Voluntary Environmental Cleanup and Economic Redevelopment Act of 1993.

Would you believe we haven't developed a satisfactory acronym yet? We've got a team assigned to it, though.

[Laughter.]

Senator LAUTENBERG. One of the key questions facing Congress is how to get the economy back on track. The bottom line is clear; unemployment is too high, investment is too low.

All here are, I'm sure, aware of the fact that one of my highest priorities is the condition of our environment and that which we leave to future generations. When we have a chance to improve the environment and, at the same time, to stimulate economic development and create jobs, that's the rare kind of opportunity that we want to get very aggressive with.

On April 3, I introduced S. 773, the Voluntary Environmental Cleanup and Economic Redevelopment Act of 1993. This legislation will foster the voluntary cleanup of potentially hundreds of thousands of sites around the country for economic development and job creation.

Initiatives like this are critical to my State of New Jersey, whose industrial legacy has left too many contaminated sites, but the legislation would help every State in the country. This legislation is good for the economy as well as for the environment.

The Superfund program, in which I have had a very active role, is designed to clean up sites that pose the most serious threats to public health and the environment. So far, EPA has identified about 1200 of the worst sites and put them on the National priorities list.

But there are also over 100,000 polluted, stagnant sites that are outside the scope of the Superfund program. These sites typically have relatively low levels of contamination and yet their full economic use is being stymied because there is no ready mechanism for cleaning them up—even when the owner of the property is ready, willing, and eager to do so.

These lower priorities sites have an enormous potential for economic redevelopment. To unleash this potential, several States, including mine—New Jersey—and Oregon and Illinois have developed expedited procedures for cleanup at sites that don't pose a significant threat to the public health or to the environment.

Under these voluntary cleanup programs, site owners can step forward and pay for the cost of remediation and State oversight. In return, they get a letter from the State that says that the property has been cleaned up at the level of satisfaction that Government recommends so that other parties, like prospective buyers or lenders, need not fear future liability. These reassurances remove an important impediment to property transactions and will free up these sites for economic development and job creation.

Now, as we are going to hear today, over 600 parties in New Jersey have signed up for the State's voluntary cleanup program in its first 18 months. The economic benefits of these programs has truly been remarkable.

By way of example; in Hackensack, New Jersey, the city's Department of Public Works yard and an adjoining oil tank farm are being redeveloped for a new, giant Price Club discount retail and food store. It's complete with a riverwalk, promenade, and a park area. The redevelopment of this site is estimated to be worth about \$15 million and will result in the creation of up to 350 permanent jobs Statewide.

The \$3 million investment that was made to start up the New Jersey program has already generated 3000 jobs and several hundred million dollars' worth of economic development—this for \$3 million. A one hundred-to-one return on an investment is pretty good, especially for a program that is less than two years old and has a lot more promise than we've seen thus far. And, in Illinois and Oregon, over 1000 parties have signed up over the past several years to participate in their voluntary cleanup programs.

I've personally seen some of these success stories and I believe that voluntary cleanup programs ought to be made available to business people and investors throughout the country. To do that, S. 773 provides seed money to encourage States to develop voluntary cleanup programs or expand existing voluntary cleanup programs that are in place. It also makes grants available to qualified municipalities to conduct site assessments to help them get the facilities cleaned up and redeveloped.

It also provides for low-interest loans to parties who want to clean up contamination where the traditional lending mechanisms are not available.

The relatively small amount of seed money in S. 773 will leverage substantial economic payoffs. I want to start the ball rolling and let the private sector run with it.

A bipartisan majority of this Committee, along with other Senators, have already cosponsored the bill. S. 773 is supported by bankers, business people, environmentalists, and local and State governments, many of whom call it a "win-win situation". The breadth of support for this legislation shows that the promise of voluntary cleanup programs for business and the environmental community alike are very inviting.

There are few direct steps we can take that will create jobs like this; this is one of them. Voluntary cleanup programs are working in States that have adopted them with an enormous return on each dollar invested. I hope that this Committee will move ahead quickly to foster volunteer cleanups that protect the public health and environment, and at the same time create some economic stimulus.

I look forward to hearing from our distinguished witnesses today on their experience with this important initiative. At this juncture, I am delighted to be joined here this morning by a member of this Subcommittee, who has made a significant contribution in the short time that she's been in the Senate.

I welcome Senator Boxer, and invite her to make an opening statement if she'd like to do that.

OPENING STATEMENT OF HON. BARBARA BOXER, U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator BOXER. Thank you very much, Mr. Chairman.

Mr. Chairman, I commend you for introducing legislation to facilitate the voluntary cleanup of contaminated sites. I would like to inform you, and I think you'll be pleased to know, I have decided to cosponsor S. 773 which will give you a majority of the full Committee on your bill, and I am very, very pleased to give you that news.

I appreciate that you've scheduled this hearing to give us the opportunity to hear the views of various stakeholders who want to see the contaminated sites cleaned up. I look forward to hearing from the distinguished witnesses who have offered to present their perspective and experience with voluntary cleanup programs already in place across the country.

I think that all of us recognize that environmental requirements and regulations can sometimes become an issue of contention. In cases in which sites are contaminated, I can understand, given the potential liability to owners, why lenders have shied away from making loans to clean them up. That's why I think your bill is so good, because you are addressing a very common-sense problem.

I believe Government can play a constructive role in facilitating the cleanup of sites that are not currently regulated under State or Federal law in the way you have suggested.

The Federal Government should build on the good work already done by some States by helping them establish voluntary cleanup programs or build upon existing programs.

Thank you once again, Mr. Chairman. I really do look forward to working with you so that we can ensure that your legislation becomes law.

Senator LAUTENBERG. Thank you Senator Boxer.

I would like to acknowledge receipt of a statement from Senator Riegle which will be included in the record.

[The statement referred to follows:]

STATEMENT OF SENATOR DONALD W. RIEGLE, JR.
CONCERNING S. 773
JUNE 17, 1993

Mr. Chairman, I commend you for conducting these hearings today on S. 773, the Voluntary Environmental Cleanup and Economic Redevelopment Act of 1993. In doing so you are confirming that while the use or reuse of economic assets can be frustrated by environmental contamination, creating the proper incentives can help induce private and public parties to undertake cleanups in order to enable efficient use of those assets to occur.

As you know, Mr. Chairman, I introduced last session, S. 3164, the Economic Opportunity and Environmental Improvement through Recycling Land Act of 1992 with Senator Jeffords. This Congress I have introduced with Senators Jeffords, Boxer, Simon, Moseley-Braun, Levin, and Dodd, S. 299, the Abandoned Land Reuse Act of 1993, which closely resembles S. 3164. Senator Bradley has joined us as a co-sponsor of S. 299. As you know, Mr. Chairman, the Senate Banking Committee held hearings on S. 299 on May 5. Since that hearing, Representatives Mfume, Velazquez, and Towns have introduced an identical, companion bill in the House, H.R. 2070. Representatives Cardiss Collins, Frank, and Thompson are among the additional co-sponsors.

During the hearings and in private and public meetings, a broad array of national, multi-State, State, regional, city, and local community organizations, public and private, have expressed their support for our effort

to facilitate the reuse of derelict land in this country that previously was used for profitable industrial and commercial enterprises. These entities include the United States Conference of Mayors, the National Association of Counties, the Coalition for Low Income Community Development, the American Public Power Association, the American Institute of Architects, the American Society of Landscape Architects, the American Farmland Trust, Clean Sites, and the Battelle Memorial Institute. Supporters from your State include the New Jersey Economic Development Authority, New Jersey Department of Environmental Protection and Energy, New Jersey Institute of Technology, New Jersey State League of Municipalities, New Jersey Conservation Foundation, Regional Plan Association of New Jersey, and New Community Corporation of Newark.

Clearly, many people recognize that it is essential to the revival of our Nation's economy and restoration of both economic opportunity and social equity in our Nation's communities that we fashion new strategies to make productive use of the land and, where feasible, the facilities previously used for operating enterprises. Our country has experienced massive dislocation and relocation of economic opportunity, particularly in the manufacturing sector of our economy. This has produced a dramatic decline in economic activity in too many of our Nation's communities, which in turn has caused a severe disruption in the capacity of local communities and States to provide

the public with basic community services and facilities. Land and land improvements have been and continue to be basic assets necessary to the conduct of industrial and other economic activities and the financing of local and State government. We must act to facilitate the reuse of this Nation's industrial and commercial assets, where feasible. In so doing we must protect the public health and the human and natural environments as well as provide satisfactory incentives to sources of private capital to reinvest in our industrial and commercial assets and thereby recreate economic opportunity in our Nation's communities.

I believe that you and I agree on these basic propositions. Our pursuit of our respective bills demonstrates this. Our bills do differ in a number of respects. I am hopeful that by working together we can fashion an approach that builds upon the complementary aspects of our bills. I thank you for this opportunity to express my views to your Committee, and I commend you for your outstanding leadership on the Committee.

Senator LAUTENBERG. Now we will hear from the first panel, which includes Mr. Robert Sussman, the Deputy Administrator of the United States Environmental Protection Agency and Commissioner Scott Weiner from the Department of Environmental Protection and Energy from my home State, in Trenton.

It invariably takes place, that when Scott Weiner is called to a place of distinction, I always remind the audience that he trained in my office as one of my very able assistants—he was the Executive Director of our State operation—and that's where he got his wisdom, knowledge, experience, et cetera.

[Laughter.]

Senator LAUTENBERG. There is also Ms. Diane Shea, who is the Associate Legislative Director of the National Association of Counties, based here in Washington, D.C.

I think each of you is familiar with the fact that while we would like to hear every word, time doesn't permit it, so we'll allow you five minutes to give a summarized statement, and we'll include your full statement in the record.

With that, we'll kick off with Mr. Sussman.

STATEMENT OF HON. ROBERT SUSSMAN, DEPUTY ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY

Mr. SUSSMAN. Thank you, Senator Lautenberg.

It's good to be here this morning. We appreciate the opportunity to discuss the important issue of voluntary cleanup. The Environmental Protection Agency has been looking for ways that we can work with State governments, local communities, and private businesses as partners in cleaning up contaminated sites.

Because the presence of hazardous waste can impair the value of businesses or corporate properties, more and more private companies are conducting voluntary cleanups prior to the sale of corporate assets. In these cases, voluntary actions in the private sector are providing additional indirect environmental benefits in addition to those attained by EPA's Superfund program directly.

Voluntary cleanup programs provide a realistic alternative to the current system of hazardous waste cleanup for low-priority sites. For this reason, Mr. Chairman, we applaud your efforts in introducing the Voluntary Environmental Cleanup and Economic Redevelopment Act of 1993. We're very supportive of the concept of voluntary cleanup and, as an agency, we're developing a strategy to work with States to promote the development and implementation of effective voluntary cleanup programs. We think that this bill will significantly strengthen our efforts in that direction and we do support it.

I'd like to comment, if I can, on some of the individual elements of the bill. First, let me make some remarks on the voluntary cleanup grant program. This is a program that will help alleviate the delay in cleaning up low-priority sites by giving States additional incentives and support for establishing and implementing voluntary cleanup programs.

We do think that this grant program is a good concept and we support it. We think that the State programs funded by the bill would accelerate the rate at which risks to the public and the envi-

ronment are reduced at a large number of sites. In addition, the grant program would help alleviate the economic burdens imposed on private parties as a result of the ownership of contaminated sites by helping to ease credit restrictions and facilitating property transfer.

With these very positive purposes in mind which we fully support, we do need to take a look at what changes might be necessary in order to make the grant program even more effective. One area of concern we have is the universe of sites that would be eligible for voluntary cleanup, as defined by the bill. We are concerned that this universe may be interpreted too broadly in some respects, and too narrowly in others.

For example, the definition of "affected sites," in our view, should be clarified to include those contaminated sites which have been evaluated under the Superfund, but have been found to be of insufficient risk to merit inclusion on the National Priority List. We believe that these are sites which have been found not to merit Federal action, and therefore are good candidates for voluntary cleanup and we think they should be eligible for inclusion in State voluntary cleanup programs.

I want to mention another concern that EPA has about the grant program, and that relates to EPA's role in reviewing State grant applications. There is some ambiguity in the wording of the bill about the level of discretion that EPA will have in passing on State grant applications. We want to make sure that EPA does have some discretion in managing grant programs so that we can be answerable to the Congress and accountable for the use to which grants are put.

Let me comment briefly on the second major element of the bill—the site characterization grant program. This provision would provide a mechanism to help local governments to conduct site assessments to determine the feasibility of voluntary cleanups. We do think that this is a concept that has considerable merit, but we have some concern about whether EPA is the right entity to evaluate site-specific grant applications. This could conceivably put a burden on the EPA staff. We would have to determine whether further characterization of individual sites is warranted. We're not sure that EPA, as a central agency in Washington, D.C., will really be in the best position to make those determinations and we would suggest that a better approach might be to have EPA make grants to the States which they could then use to provide funds for site assessment to local communities.

Finally, let me comment on the economic redevelopment assistance program that the bill would establish. This, in our view, is an interesting and perhaps worthy concept, but we do have some concern about EPA's role in its implementation. The legislation would require EPA to address real estate and economic issues and to provide loans based on a determination of economic redevelopment potential. We are not sure that EPA possesses the expertise to make these determinations.

In addition, the bill would make EPA responsible for collections and enforcement actions relating to redevelopment loans. We have some concern that these enforcement actions might divert re-

sources from our statutory enforcement responsibilities under the Superfund program.

Let me say, in conclusion, that we do view this bill as a very positive step and we look forward to working with the subcommittee to move it forward.

Senator LAUTENBERG. Thank you very much, Mr. Sussman. Now, we'll hear from Commissioner Scott Weiner.

STATEMENT OF SCOTT WEINER, COMMISSIONER, DEPARTMENT OF ENVIRONMENTAL PROTECTION AND ENERGY, TRENTON, NEW JERSEY

Mr. WEINER. Thank you very much, Senator.

I appreciate the opportunity to be here today and talk about this bill. Simply stated, I don't think that the significance and the opportunity that this piece of legislation affords can be overstated.

Based on my experience in establishing and implementing a voluntary cleanup program in New Jersey, I can say unabashedly that S. 773 will result in both economic revitalization of sites that are now dormant, while at the same time improving environmental quality in and about those areas. That's what we're all after, and this bill is a good illustration, I think, of almost a broader public policy—that we don't have to choose between economic opportunity and the environment—that false choice that's often handed up to us. Where we have well thought out common sense legislation, Government action can achieve the interdependent goals which is more than just a balance of economic growth and opportunity and environmental enhancement.

As you discussed, and as Bob discussed, a lot of contaminated sites aren't covered by existing programs. Our experience in New Jersey was that we had a number of low-priority sites which ultimately remained dormant. In fact, I want to tell you the story of what brought about our voluntary cleanup program.

Shortly after I became Commissioner, a property owner came to the Department and indicated that he had acquired a piece of property, learned that it was contaminated and wanted, during the economic downturn, to invest in investigating and ultimately remediating the property so it could be ready for investment and development when the time came.

He came to the Department, offered to clean it up to any standard that the Department wanted, offered to have the Department look over his shoulder every step along the way, offered to pay for all of the Department's expenses, and our institutional answer was, "Sorry, we just can't do that—we can only do it if you sign an administrative consent order, if you put up stringent financial assurances." Frankly, we treated as enforcement action or a categorical case, rather than a voluntary effort to remediate a property.

I remember a lesson that you taught us when I was working with you, Senator, and that was to look behind the initial reaction for a more common sense approach. We tried to put our eyes back on the target of getting properties revitalized and if we had adhered to the then-institutional policy of the department, we would have ended up with the unacceptable result of a contaminated piece of

property that remained dormant. That just simply was unacceptable.

So, we came up with what we thought was a better idea. Admittedly, New Jersey had an existing infrastructure of environmental remedial programs that we could draw upon. Not only in terms of experience, but some resources. So, we established a program which provides for voluntary participation and a voluntary agreement. It provides for, among other things, that the property owner or developer can come to the Department and have us involved in as much or as little of the cleanup process as they want. We have established cleanup standards so they know the target they're shooting for. They can participate anywhere along the line or the spectrum of cleanup, from initial identification and investigation to the ultimate cleanup, and the Department will be reimbursed for all of its expenses. It just seemed to make common sense to us.

As you pointed out, in the some 16 months that we've had the program, over 650 properties have entered the program. Last year alone, we had over \$10 million of investment in remedial activity itself, but even more important is the hundreds of millions of dollars of economic activity that then leveraged into.

Senator, you had the opportunity to visit some of those sites, and you reported on some of them in your opening remarks. There is simply no doubt in my mind that my colleagues in other States around the country not only are willing to institute programs like this, but they want to develop programs like this. As you pointed out, some States already have.

The greatest deterrent is not a lack of common sense at all, but a lack of existing resources and capacity. What your legislation will do is provide for the investment in a very targeted, specific way, with a small amount of public resources that will allow this leverage to take place and allow these programs to flourish.

It's another good example of the types of Federal-State relationships that we should be defining these days and I want to take the opportunity for a minute to just make a few remarks about the EPA and specifically Deputy Administrator Sussman and Administrator Browner's efforts over the past few months to aggressively work on defining a partnership relationship with the States, which represents a significant change in how we go about the issue of environmental management of this country. This piece of legislation adheres to that philosophy. It begins to distinguish the roles of the State and Federal Government, and makes sure we don't duplicate our resources. It means we're not looking over each other's shoulders, duplicating what we do, but assigning appropriate responsibility, I think, for EPA to develop broad program requirements, to make sure that those program elements are in place before money is distributed, and it distinguishes, potentially, between oversight of a program and the fiduciary responsibility that is required when auditing dollars. There were distinguishing characteristics to provide the foundation for a whole new nature of a partnership relationship between the State and Federal Government.

In short, this is a good, common sense tool and there simply can be no doubt, based upon the experience in our State or in the other States that you've mentioned, that this Federal investment will lead to not only leveraged economic growth, not only real environ-

mental quality, but it will do it soon, it will do it quickly, and it will do it efficiently. Quite simply, this legislation cannot be enacted soon enough for all those folks who are waiting for an opportunity to voluntarily step up and begin to develop their properties.

Senator LAUTENBERG. Thank you very much, Mr. Weiner.

Ms. Shea?

STATEMENT OF DIANE SHEA, ASSOCIATE LEGISLATIVE DIRECTOR, NATIONAL ASSOCIATION OF COUNTIES, WASHINGTON, D.C.

Ms. SHEA. Thank you, Mr. Chairman and members of the committee.

The National Association of Counties appreciates the opportunity to express our support for S. 773.

I'm Diane Shea, Associate Legislative Director for NACo's Environment, Energy, and Land Use Steering Committee. I might also mention that the National Association of Towns and Townships asked me to express their support for S. 773 as well today.

NACo believes that the protection of the environment and wise development of our Nation's resources are obligations shared by citizens, private enterprise, and government at all levels. S. 773 clearly reflects this approach. The bill is intended to assist States, local governments, and private entities in their efforts to facilitate the redevelopment and reuse of largely urban and suburban industrial sites in need of cleanup of minor levels of contamination. The remediation of these sites and their reuse and the economic development of our communities is recognized as a National problem requiring Federal involvement and partnership with other levels of government and the private sector.

As you have observed, Mr. Chairman, the existence of these sites is a serious impediment to community and economic development. Since most of these sites have only minimal levels of hazardous waste deposits, they're not contaminated enough to be placed on the National Priority List, yet prospective lenders and developers are understandably reluctant to get involved because of the potential of future liability. So, the sites sit unused or underutilized when, with just a small amount of Federal dollars, they could be placed back on the tax rolls and once again contribute to the economic health of the community.

We are particularly pleased with Section 5 of the bill which requires EPA to establish a grant program to local governments to conduct site characterizations for affected sites.

This provision would allow a local government which does not have adequate funds of its own—that includes most of us these days—to obtain a clear picture of the extent of contamination, the estimated cost of cleanup, and the scope of potential liability. Such information is critical in order to enter into, for example, a public-private arrangement with a developer who is willing to invest in a property but needs to know the degree of his or her risk.

In addition, the grant program would permit a county or city to work expeditiously with a private owner who wants to voluntarily clean up the property, but lacks the funds to determine the nature and extent of the contamination. For a relatively small Federal in-

vestment, a local government would be able to examine and then demonstrate if there was potential for stimulating economic and jobs and whether further public and/or private investment is justified.

Having such information about a site is necessary if funds for cleanup are to be sought from lending institutions or if they're to come from the general fund of the community. Banks as well as taxpayers need to be assured that they are making a reasonable decision in spending their resources. That information is also essential as a component in negotiating with prospective purchasers of the site who might be interested in economically restoring that property and providing new jobs.

The bill wisely limits the grant funds to economically distressed communities and we concur with this limitation. There are more than enough eligible counties and cities and towns in this country, I assure you, to make good use of the grant program. As an example, I might just mention to you that the Chicago Sun Times carried an article on March 14 of this year that spoke about the abandoned sites in the city and surrounding Cook County. In one neighborhood, in a 1.5 square mile area, in West Garfield Park, the community organization there found 40 former industrial sites in one neighborhood, now empty. The city is currently in the process of developing a more comprehensive list of how many of these sites are available.

There have been some preliminary assessments done. They are very expensive to do and this bill is going to help, we believe, in assisting places like Chicago and surrounding suburbs in providing those assessments.

We are very supportive of the bill, Senator Lautenberg, very appreciative of your efforts, and of the other sponsors in recognizing this problem and seeking ways to return such contaminated sites to economic productivity.

In conclusion, I just wanted to quote the city Environmental Commissioner, Henry Henderson, in Chicago, who calls returning these sites to economic productivity "the ultimate in recycling". Reusing the public's investment—and I might mention, significant Federal investment—in transit, roads, power, sewer, water, and housing in old, industrial areas instead of abandoning them build anew out in green areas, out where new services have to be provided, is the logical and most environmentally protective thing we can do.

We agree with that assessment and commend you for bringing this bill forward, as well as for your longstanding leadership on behalf of local governments.

Senator LAUTENBERG. Thank you very much, Ms. Shea.

I wanted to make sure that the record is clear. Mr. Sussman, you talked about differentiating between those sites that might qualify for a review by Superfund and either be on the National Priorities List, or potentially appear on that list, or at least be reviewed with some regularity to see what the full assessment is.

Is there some kind of a benchmark, below or above which we say that a site belongs here or another site belongs there? Can it be so refined that it's a relatively easy conclusion to come to so that the standard can be applied by State agencies, to keep from getting

into a continuing debate over whether a site provides the opportunity for voluntary cleanup at a relatively minimal cost?

Mr. SUSSMAN. I think there are some clear and workable guidelines that we can provide here, although we do need to leave some room for judgment and I think we also need to leave some room for dialog between State governments and EPA. In my mind, the sites, that EPA should be focusing on are what I would call NPL-caliber sites which are contaminated to a degree which would meet EPA's criteria for listing on the National Priority List. It may be that in individual instances, we would want to defer those sites to the States, but I think for purposes of voluntary cleanup, a good rule of thumb is that an NPL-caliber site should be left to EPA.

Senator LAUTENBERG. That we won't argue about. But, the question is, what's the next level down? If the site either belongs on the NPL among the 1200 or so worst sites in the country and others—Scott, do you have a point of view on this?

Mr. WEINER. Yes. I think we would deal with a couple of universal sites. If a site gets screened out as a non-NPL site, it then goes into the State universe. The way we've set up our program is that we have our own in-State rankings and our voluntary cleanup program only pertains to lowest priority sites. So, once a site might get screened off NPL, you then have to look into a particular State's handling of that site within its own standards. Again, I think with dialog between the agency and the States, it's very easy to set up criteria, then we can focus in an area that you want to focus on, which are the low-priority sites that require minimal investment in order to get them remediated and active.

Senator LAUTENBERG. OK. So, there will be a number of sites still relatively unattended to base, perhaps, on the magnitude of the assignment as well as the toxicity, et cetera, that will still be in the process of evaluation.

What I'm looking to do is to try to get this as simplified as we possibly can do it, so we can move expeditiously. I think New Jersey has had pretty good success with that and I assume that there are a number of criteria that can be established that would fairly easily let you say for sure, "These belong over here and would qualify under the standards for a voluntary cleanup."

Mr. SUSSMAN. Senator Lautenberg, If I can address that for a moment. I think that any site that EPA has evaluated for listing on the NPL and determined does not meet our listing criteria would be a site that we would say is not of Federal priority and, therefore, is a site that we think would be a good candidate for State voluntary cleanup programs.

I think that is a bright line that we can draw.

Senator LAUTENBERG. Would EPA oppose efforts to use this bill to modify RCRA permitting, treatment, disposal requirements which apply to contaminated soils and media removed during voluntary cleanups?

Mr. SUSSMAN. Senator Lautenberg, we do think that this bill is the wrong vehicle for revisions in RCRA. The permitting provisions of RCRA in their current form may be a disincentive to voluntary cleanups in some instances, but that is a problem that we would like to address elsewhere. We think that this is a good bill. We

think it's a simple and workable bill and we'd like to move forward without encumbering it with revisions in RCRA at this time.

Senator LAUTENBERG. If we were to require EPA to provide a complete release from liability for sites cleaned up under the State voluntary cleanup programs, how would EPA and the States go about establishing this process of release? Could you describe the kinds of resources that might be needed to make that determination, and what you might need later on to be satisfied that a release is appropriate?

Mr. SUSSMAN. I think that the resources could be quite extensive. We would need to conduct an evaluation of the individual site. We would need to assemble and review all available information about contamination at the site. We would need to examine the effectiveness of the remedy and we would have to be very satisfied that the site indeed has been cleaned up to Federal cleanup standards. That would be a very big expenditure of effort and even then there would be some risk that we overlooked some residual contamination which we might want to address at a later date.

I would point out that even under the Federal Superfund program, the covenants not to sue that EPA gives are not unconditional. We always reserve the right to reopen a matter and seek additional remedial action if circumstances so warrant.

Let me suggest that a better approach here is to look to the State to evaluate the adequacy of the cleanup. I understand that New Jersey and other States do provide certifications in cases where they believe that the voluntary cleanup is adequate. Our sense is that those certifications have, in fact, been quite useful in persuading investors that there is not a liability deterrent to redeveloping the property.

Mr. WEINER. I can second that. Of course there's a desire on the part of any owner or developer to look for certainty and finality. I usually qualify it by saying "appropriate finality"—when you figure, when is it really over? It needs to be over—an owner needs to be able to walk away understanding the limits of their liability, if any.

Senator LAUTENBERG. If you want to promote voluntary cleanup and you decide that this is how you're going to go about it, these are the criteria by which we're going to measure the success of the program—however, you understand that someone could come back at you.

Isn't there a certain reassurance given to the party that says that if we give you a certificate of clearance—call it what you will—that this immunizes you from further action?

Mr. WEINER. What we do in the certification is to say, essentially, "You're done." It's over, and the one area of continuing liability or continuing risk that we all face is significant changes in standards. Not the minimum change of standards, but new information, not about a site, but of scientific certainty. We try to describe it as no property that's going through the process would be put at a risk different than other properties similarly situated. The fear, of course, is that somebody will spend large sums of money—or small sums of money—and think they're done, only to have somebody knock on the door and tell them to try again.

So, we are able to avoid that. I agree with Bob, too, that this is appropriately left to the States. Each State will have its own scheme of regulations and statutes as to when something is finished and what degree of certification it gets. No voluntary cleanup program will work without it, but I think, again, it's something appropriately left to the States. In our experience, the absence of a Federal sign-off, if you will, has obviously been no deterrent to the 650 properties coming in and participating in the program.

Senator LAUTENBERG. Scott, I wanted to ask you whether you found that the RCRA cleanup requirements that govern contaminated soil removal during cleanup—are they discouraging people from volunteering to clean their sites?

Mr. WEINER. Senator, in our experience, they're not. There could be a whole other reason as to why they're not, but the simple answer is that they are not.

Senator LAUTENBERG. OK, that's what I wanted to know.

Mr. Sussman, is there any estimate of the number of States that might be interested in establishing a voluntary cleanup program?

Mr. SUSSMAN. We don't have a precise estimate, but our information is that there is in the range of 15 to 20 States that right now do have voluntary programs of some magnitude and we would think that if this legislation were passed, a number of other States might decide to join the effort.

Senator LAUTENBERG. Do you agree with that, Ms. Shea?

Ms. SHEA. Absolutely. I think there are a lot of States—and a lot of local governments who would be encouraging their States to apply.

Senator LAUTENBERG. They're anxious to find a way to do this. Thank you.

Senator BOXER.

Senator BOXER. Thank you, Mr. Chairman.

I served as a county supervisor for six years and, putting on that hat for a moment, I would like to encourage you, Mr. Chairman, to limit the EPA's role here—as you have done in the bill—which basically is awarding grants to those States that they feel are capable. I'm concerned that if we put them into this mix—we have new leadership and I'm excited about it and it's wonderful—but when you look at the past, we've cleaned up, it looks to me, 90 out of 1200 sites on the list. In California, 1 out of 95 sites. I know they're very difficult cleanups, I know all that, but I don't think we exactly have a record of being speedy. I think one of your concerns, and rightly so, is that economic development is lagging because lenders won't come into these sites.

With that in mind, I would ask Mr. Sussman this question. You were suggesting to the Chairman that one way to go about which sites—and you had concern about his bill in that regard—that it be sites that you have evaluated. Why does it have to be sites that you have evaluated? I would assume—and I would ask Ms. Shea and Mr. Weiner—that there are many other sites that aren't as contaminated as the sites that you have investigated. Frankly, Mr. Chairman, those are the ones I think we could get to very, very quickly.

Would you expound on that?

Mr. SUSSMAN. Right, I don't think there's a disagreement here, Senator Boxer. Let me try to clarify our position here. We certainly agree that sites that EPA has not evaluated are prime candidates for voluntary cleanup. There are a vast number of those sites around the country and it will be many years before many of them are evaluated under the Federal Superfund program. If we can begin the job of cleaning them up now, on a voluntary basis, under State programs, that will be of great benefit to everybody.

The only point that I was making is that in addition to that universe—the universe of sites that have not been evaluated at all—there is another universe of sites that are also candidates for voluntary cleanup, and those are sites that have been looked at under the Federal Superfund program and found not to be worthy of Federal attention. We want to make sure that those sites are not viewed as ineligible for voluntary cleanup because we think that there really is an important State role to be played. But, let me be absolutely clear that the much larger universe of sites that have not been evaluated should be included in the voluntary cleanup effort.

Senator BOXER. That's good, because I thought that you were saying that this should be restricted to those sites that were evaluated but were not placed on the list, and those probably are much more difficult sites.

Do you have a comment on that, Mr. Weiner or Ms. Shea?

Mr. WEINER. I would agree. The only point I want to expand upon is that once you go through a NPL screen, it's up to a State to decide where that screened site falls within the State's hierarchy of cleanup. It might be one that would fall into our enforcement program and would, by definition, not be eligible for voluntary cleanup, or it may be a prime candidate, having just been screened and found to be a very low priority.

Senator BOXER. Ms. Shea?

Ms. SHEA. Senator Boxer, I just wanted to comment that I think that by looking at some of these lower priority sites where, typically, the contamination is underground storage tanks with gasoline in them or, perhaps, some other petroleum products—those sites, I think, can have their site characterizations and cleanups done at relatively low cost, can get them turned around and back into the economic stream fairly quickly, so in terms of getting the most cost effective solution, I think we might want to also look at the fairly low contaminated sites and get those taken care of and out of the range of concern.

Senator BOXER. That would be what my common sense tells me—that this is an opportunity to focus on some of the easier sites that are sitting there, and move them relatively quickly. That's why I think this is such a good bill.

Mr. Weiner, in your experience, has the public been adequately consulted in decision making regarding which sites should be cleaned up? I mean, what is the process that you use in New Jersey for this?

Mr. WEINER. In the voluntary program, in terms of which sites should be cleaned up, it's often initiated by the owner or, in some broader sense, the community. I spent a number of years as a local city councilman and we had a couple of occasions where localities,

in conjunction with property owners, have said that this may be a good program to enter into and develop a public-private partnership on the redevelopment of the property. The Robling site in Trenton is an example.

In terms of community participation, we find in this program, where we have low-priority cases and voluntary cases, that if that participation occurs it is usually through the elected officials, either at the county or local level.

We are finding that our biggest concern, when we launched the program, Senator Boxer, was that somehow this would be an escape hatch for high-priority cases that would otherwise be enforcement matters. The concern in the community was that we were letting people out of their enforcement obligations, that this was too easy, that there was no financial assurance and the like. But, as people began to understand the parameters of the program and that this was not a replacement for our categorical program, but intended to develop clear standards about certainty of process to allow people to step up and volunteer for remedial effort with appropriate oversight, then the public support has been enormous, particularly as they see economic opportunity coming into their communities.

Senator BOXER. Getting to the Chairman's question, who certifies that a site has been cleaned to a certain use? Is it the county health people? Is it the local people? Is it the State Department of Health?

Mr. WEINER. In our case, it would be the State Department of Environmental Protection and Energy, or the Site Remediation Program which establishes and administers the cleanup standards themselves.

Senator BOXER. And do the lenders, after that, take their word pretty well? In other words, the Chairman was asking whether EPA ought to come into this. I share concerns that if we do that, I think Mr. Sussman is right—once we give that to the EPA, we're looking at a lot of time and a lot of cost. So, I'm trying to get to the point. If the State Department of Environment, in your case, signs off on it you're saying that is enough reassurance for the neighbors, for the community, for business, for the banks, et cetera?

Mr. WEINER. That's right, because we have a this whole process and what we call "no action letters" and certifications. Additionally, Governor Florio just signed a piece of legislation that, among other things, reiterates and codifies the certainty that's required at the point of a "no action letter," and statutorily speaks to the limits of liability and the finality of a cleanup.

Again, I would suggest, Senator, that this is appropriately a State-by-State issue, depending upon how they design their remedial schemes and who they assign that responsibility for. There's no single way that this can be done, but when the State, acting through whatever instrumentality it picks, says it's over, that's not only going to be enough, but it's going to be a prerequisite for any program to succeed.

Senator BOXER. And Mr. Sussman, just to make sure that I understand—it is EPA's position that your focus should stay on the Superfund sites and outside of doing functions that Senator Lau-

tenberg has recommended and put into his bill, that you would prefer not to get involved in the evaluation of those cleanups?

Mr. SUSSMAN. That's absolutely right. We have a large workload under the Superfund program and we'd like to focus our resources on completing construction at those sites which are on the NPL. We have confidence that the States can play a very effective role here and we would like to give them incentives to develop programs, but we don't want to exercise a big stick and we don't think we need to.

Senator BOXER. Thank you very much, Mr. Chairman.

Again, I'm going to have to leave to go to another meeting. I wanted to thank you again for your leadership on this.

Senator LAUTENBERG. Thank you very much, Senator Boxer. We really like having you work with us because you want to get things done and I think that with your help we can get this done.

As for an acronym for the bill, we'll call it VEXER— instead of V-E-C-E-R, we'll call it V-E-X-E-R. That's what this bill will provoke by way of a little discussion.

[Laughter.]

Senator LAUTENBERG. We hope it's, relatively speaking, de minimis or, as I learned here, there's another word called "demicromis"—I turn to my attorney over here to make sure that I'm not saying anything out of school.

[Laughter.]

Senator LAUTENBERG. Thank you very much. We appreciate having you, and any questions that we have further, we'll submit to you in writing and would ask for your quick response. Thank you.

Mr. SUSSMAN. Thank you, Senator.

Mr. WEINER. Mr. Chairman, thank you.

Ms. SHEA. Thank you.

Senator LAUTENBERG. We'd like to call the next panel.

Ms. Hill, Mr. O'Brien, Mr. Early, and Dr. Alter.

We're delighted to have you here with us. We'd ask that you note the rules as previously mentioned—your full statement will be included in the record, but we would ask you to summarize, to try to stay within the five minute rule.

We'll first ask Ms. Hill. Thank you for being here. Please give us your testimony.

STATEMENT OF ANNE PENDERGRASS HILL, AMERICAN BANKERS ASSOCIATION, WASHINGTON, D.C.

Ms. HILL. Good morning, Mr. Chairman. My name is Anne Hill. I am Vice President and Senior Counsel for First Interstate Bank of Oregon, which is a subsidiary of First Interstate Bancorp, which owns 17 banks in 13 western States.

A substantial part of my in-house practice is environmental matters. I'm here today on behalf of the American Bankers Association to comment on S. 773, the Voluntary Cleanup and Economic Redevelopment Act of 1993, which is based on successful State programs like the program in your State and like the program in Oregon.

I was a member of the Oregon Department of Environmental Quality Advisory Committee, which set up the Oregon program,

and I've been asked here today, I understand, to comment on the banks' perspective on the Oregon program.

After listening to Mr. Weiner talk about the New Jersey program, I can say that the Oregon program is very similar. It was created in 1991 to assist property owners in the cleanup of contaminated property. The property owner voluntarily approaches the Oregon DEQ and enters into an agreement to pay DEQ for all of its costs to oversee the property owner cleaning up the property. The property owner even pays DEQ's overhead.

The voluntary nature of the relationship between the property owner and DEQ means that the cleanup is quicker and the fact that it's quicker means that it's less expensive, since in cleanups, time is money.

At the conclusion of the cleanup, the DEQ issues what they call an "NFA letter"—a "no further action letter"—which states that the cleanup is satisfactory to DEQ for purposes of all of the contamination which was disclosed, so long as the law remains substantially the same.

The Oregon program works. There isn't any down side to it. It's good for Oregon, and I think that means it's good for banking in Oregon.

There was substantial discussion in Oregon about whether the NFA letter was going to be meaningful or adequate for banks. The reason for the question was that there isn't any protection against undisclosed contamination. There isn't any protection against substantial changes in the law or subsequent action by EPA.

Certainly, banks would prefer an ironclad sign-off. Bankers love certainty—I don't know anybody who doesn't like certainty, but that's not likely to happen, as you've heard here today. It may not even be in the best interest, frankly, of Oregon, to have an ironclad sign-off or in the best interest of banking to have parties that are otherwise liable-released when maybe they shouldn't have been, fully.

Since there isn't going to be an ironclad sign-off, banks can and will learn to evaluate the risk of later DEQ or EPA action. They can do this by consulting with their own environmental and legal professionals.

As a practical matter, it seems unlikely that EPA would turn its attention to a site that DEQ had signed off, and it's unlikely that DEQ is going to take the time to come back to a site on which it previously signed off, absent some compelling problem.

The Oregon program is good for banks because when DEQ is involved, the risk of liability to the bank is reduced. It provides a degree of certainty that the cleanup is being done correctly. It reduces the risk that the site will be revisited by DEQ or EPA, and it makes close lender monitoring of any cleanup unnecessary, which reduces the lender's risk of lender liability under Superfund.

Although the ABA endorses the concept of voluntary cleanup, there are provisions—the provision in the bill authorizing a Federal super-lien, in Section 6, is the major concern to the ABA today. First of all, giving the lien priority over pre-existing liens is an obvious concern to bankers. Bankers value and rely upon the priority of liens.

In my discussions with officials at the Oregon DEQ, they agree that to give a super-lien, in this case, may undermine the trust that they feel they've already built up in Oregon. It changes the rules midstream.

The bill should also be amended to provide that any lien which attaches under Section 6 arises only when it's properly recorded under local State recording statutes. Right now, the bill provides that the lien attaches at the time that the U.S. grants a loan, which really turns the lien into a secret lien. It needs to be amended to provide that it attaches when it's properly recorded, because to do otherwise will throw the transfer of real property into some disarray.

The ABA would like to thank you for giving us the opportunity to comment on your legislation, and hopes to work with you to reach the goal of cleaning up over 100,000 sites to stimulate economic redevelopment. At the same time, the ABA also hopes to work with you to pursue Federal statutory reforms for innocent lenders and trustees who are liable for cleanup costs when they are not responsible for contamination.

As you know, Mr. Chairman, your State of New Jersey recently passed legislation protecting financial institutions and trustees. Oregon has similar laws. Lenders in other jurisdictions, and Oregon and New Jersey, still need a Federal statutory response to this problem.

In conclusion, the Oregon voluntary cleanup program is good for Oregon and it's good for banking in Oregon. Any program which is designed to clean up more contamination, faster, without taxpayer dollars, is good for the country and good for banking in this country.

With the reservations I've discussed concerning the super-lien, the American Bankers Association supports this bill.

I'm pleased to have been here today and look forward to answering any questions that you may have.

Senator LAUTENBERG. Thank you very much, Ms. Hill.

Mr. O'Brien, you're next.

STATEMENT OF JAMES O'BRIEN, CHAPMAN & CUTLER, CHICAGO, ILLINOIS

Mr. O'BRIEN. Good morning, Mr. Chairman, and members of the subcommittee. My name is James O'Brien, and I'm a partner in the Chicago office of the law firm of Chapman and Cutler.

As part of my work, I provide advice to lenders about environmental issues. My prepared statement discusses why S. 773 works for lenders and my colleague, Anne Hill, has spoken to that issue.

I also provide advice on voluntary cleanups. At hundreds of sites, I have worked on cleanups ranging from removal of stained soil to underground storage tanks to encasement of thousands of yards of coal tar in concrete along the Chattahoochee River. I have had good experience with the Illinois voluntary cleanup program, which I would like to address.

Illinois has a voluntary cleanup program and it has been effective since 1986. The current form of the program is called the Illinois Prenotice Site Program. Through the program, IEPA—that's

the Illinois Environmental Protection Agency—has entered into oversight services agreements at 288 sites. Remediations have been completed successfully at 39 of those sites and are in progress at another 70. Assessment or investigation is ongoing at 102 sites and the program will handle another 77 sites.

The Prenotice Program is administered in conjunction with IEPA's nonvoluntary remedial actions and is comparatively inexpensive. Participating parties, on average, have paid a \$2000 prepayment of oversight costs upon entering the program, and an additional \$5800 in oversight costs to complete it. The Prenotice Program has been employed for some very prominent Chicago projects, including the Santa Fe Railroad Yard, Navy Pier, and the Lincoln Park Gun Club.

Let me be more specific, however, about a site on which I worked for a client. The company is a large, multinational company which manufactures a variety of well known, name brand products. Over the last several years, the company had continually expanded its industrial campus in a city in Illinois. The company employs several thousand persons at that campus in highly skilled, highly paid, engineering, design, and production jobs. As the industrial campus expanded, the company had continued to acquire more buildings, employing more people. Eventually, however, the industrial campus was not large enough to efficiently accommodate all of the company's operations. There were really two problematic choices: either move all of the operations to a new location, where there was sufficient space for expansion, or acquire available property which was adjacent to the campus.

The first alternative could have prompted moving some of the operations—and, in fact, perhaps all of the operations—out of the United States altogether. The problem with the second alternative, however, was that the only available property was significantly contaminated from former wood treating operations.

Although concerned about the complex and broad environmental laws, the company explored the possibility of remedial action during the construction and expansion of the facility. Working with the IEPA, the company prepared a remedial action plan which incorporated the cleanup as part of the construction, and by performing the remedial work during the construction, the company was able to absorb the additional costs economically and still go forward with the project.

The company's and IEPA's commitment to this project meant that several thousand jobs would stay here in the United States, and once the construction is completed—which should be very soon—the new facilities are expected to create approximately 500 new jobs in design, engineering, and production work. As far as I'm concerned, without the Prenotice Program, Illinois would have lost those 500 jobs and, potentially, the U.S. would have lost several thousand very good jobs.

There were several important factors to the success of the project. First, IEPA had in place a program to provide oversight of the site investigation and remedial action. The company would not have been willing to rely simply on the assurances of private environmental consultants about the cleanup standards.

Second, by funding the costs of the oversight, the company was assured that its project would receive timely and proper attention. The problems with tight governmental budgets have affected all agencies, including governmental regulatory agencies that deal with the environment.

Third, the company was working with State environmental agencies who had a firm grasp of the local issues raised by the contamination problems in that otherwise very vibrant and good Illinois municipality.

And then, finally, the company had the financial capability to pay the costs as part of the facility construction.

I find that S. 773 reflects each of these lessons learned from the success in Illinois. The legislation provides the opportunity for States to establish voluntary cleanup programs and even though each State is different, with ten managers, Illinois has been able to provide oversight at 300 sites.

Second, the legislation allows the States to require reimbursement of costs. Third, the legislation provides that the State will provide oversight rather than the Federal agency. And finally, for those deserving projects, the legislation provides funding and a funding mechanism.

As an environmental lawyer who has enjoyed the success of the Illinois program, I can say that State voluntary cleanup programs work. The Illinois program has saved and created new jobs, and I support the passage of S. 773.

Thank you, Mr. Chairman.

Senator LAUTENBERG. Thank you very much, Mr. O'Brien.

Blake Early, please.

STATEMENT OF BLAKE EARLY, WASHINGTON DIRECTOR, THE SIERRA CLUB, WASHINGTON, D.C.

Mr. EARLY. Good morning, Mr. Chairman. My name is Blake Early and I'm the Washington Director of the Pollution and Toxics Program for the Sierra Club. I'm very happy to join you this morning to testify in support of the Voluntary Environmental Cleanup and Economic Redevelopment Act.

While the subcommittee will, no doubt, spend a long time deliberating on how best to improve Superfund, S. 773 represents a discreet effort to address one of the unintended effects of the Superfund program—the reluctance of those who own or buy properties containing low levels of contamination to use or develop these properties for economically productive purposes. It is my sincere hope that the subcommittee and the full Committee could move expeditiously on this legislation, in a fashion that does not get bogged down with the Superfund reauthorization process.

Let me state, at the outset, that a very valuable but unmeasurable aspect of the Superfund program itself has been the stimulation of cleaning up contaminated sites all across the Nation. We don't know how much of this cleanup is occurring and we are very hopeful, of course, that this cleanup is being done in an environmentally responsible fashion, but we know it is being done.

However, today, this bill deals with an unintended effect of Superfund, which is to influence other owners of contaminated sites

to avoid cleaning them up and avoid using them for productive purposes for fear that they might somehow get caught up in the Superfund program, or the RCRA corrective action program.

On the one hand, we think this reluctance is good. We don't want those who own highly contaminated sites to use them in a way that might threaten public health and the environment. But, on the other hand, it's very clear that the Superfund program has encouraged some to avoid governmental entanglements, even at contaminated sites where the level of contamination is very low and really poses no realistic threat to public health and the environment. The unhappy result is that these properties are not being put to productive use.

Let me make it clear that we think that this program addresses that kind of problem in a very effective fashion, but we will oppose a voluntary cleanup program which we believe could be used to encourage "band-aid" cleanups designed to reduce hazard levels sufficiently to escape Superfund, but which do not assure adequate protection of public health and the environment, or which actually increase risks to nearby communities during the cleanup process. That is not what we think that this program should be used for and we are pleased that, in our view, the bill currently contains measures that assure that the program won't be used for that purpose.

I recommend that the bill not be amended in ways that modify three key elements that it currently contains. First of all, S. 773 is limited, both in terms of the sites that would be subject to cleanup, and the grant program itself.

Second, the bill requires adequate public participation. We believe public participation is the best way to assure that the program is implemented as intended, without extensive Federal oversight.

Third, the bill requires that States and localities be able to assure cleanup if the initial owner or purchaser reneges on their cleanup obligation. We believe this element is very important because it reduces the likelihood that a State or locality will use this program to promote cleanup of sites which pose real potential threats to the health of the environment.

Let me turn now to some suggestions for modest improvements that could be made to S. 773 to make it operate even more effectively. As I've already stated, we're very concerned that sites posing real threats to health and the environment are not addressed under this bill and S. 773, by excluding sites that are subject to Superfund and RCRA has largely done this. But, we believe there are some areas of ambiguity which remain.

First, I would recommend that the bill explicitly bar the cleanup of landfills and waste impoundments from eligibility under this program. According to the Office of Technology Assessment, 11 billion of Subtitle D solid waste is generated annually in this country. We don't have good information about how dangerous these wastes are, but it is very clear that the nature and complexity of landfill and impoundment cleanup is well beyond what we believe the scope of this program should cover.

A related waste category should also be specifically excluded from the program. As you know, the Superfund program contains a

very controversial exclusion of petroleum wastes from coverage of the program and S. 773, by excluding sites covered by Superfund, does not clearly exclude petroleum waste sites from eligibility for cleanup under the program. These wastes, by their nature, are of sufficient potential hazard that we believe rigorous standards of cleanup should apply and we cannot support a program that has the potential of promoting the cleanup of potentially dangerous petroleum wastes without adequate cleanup standards.

As I mentioned previously, we strongly support adequate public participation that's required under S. 773, but we caution that too often there is a different interpretation of what adequate public participation really means on the part of State and local officials, at least as we have experienced in other programs. It's really important, we believe, that this term be better defined. Very frequently, notice is interpreted to mean simply posting notice of an activity in the county courthouse. Very frequently, we find that citizens don't get the information regarding an action in a timely fashion to really participate in a meaningful way, and we would like to work with the committee to provide some meat on the bones of what adequate public participation means.

Finally, Mr. Chairman, we support the provisions in the bill which authorizes the administrator to terminate a grant made to a State and require full or partial repayment in cases where the cleanup program no longer meets the minimum elements of Section 4(a). We would recommend that you augment this authority to terminate the grant by providing a petition whereby any person could petition EPA to terminate the grant program. EPA should be required to respond to the petition within a reasonable time period and the availability of such a process would more effectively the use of the voluntary cleanup program for unauthorized purposes.

In conclusion, Mr. Chairman, we fully endorse this legislation and hope to work with you to make it even better. We commend you for moving forward on this and hope that Congress can move on this legislation in an expeditious fashion. Thank you, Mr. Chairman.

Senator LAUTENBERG. Thank you very much, Mr. Early.

Dr. Alter, we're pleased to have you here.

STATEMENT OF HARVEY ALTER, MANAGER, RESOURCES POLICY DEPARTMENT, U.S. CHAMBER OF COMMERCE, WASHINGTON, D.C.

Dr. ALTER. Thank you very much, Senator. It's a pleasure to be here.

I can't help but make the observation of my unique position—I'm the cleanup witness on a cleanup bill—and I hope I can do it justice.

[Laughter.]

Dr. ALTER. I'm Harvey Alter from the U.S. Chamber of Commerce, and Manager of the Resources Policy Department.

I want to start by reiterating our common or shared goals of moving along the cleanup, of achieving more cleanup. This bill is the right kind to do that. It leverages private sector volunteerism with public sector oversight—something we all want—to return property to the economy. We hope the approach will serve as a

model for other programs throughout the Government, not only in the environment.

Is there optimism that the approach will work, or it won't work? We are optimistic that it will work. We want to start out not trying to pick it apart and saying this or that may make it fail, but rather "the glass is more than half full"—let's go with it, let's try it and let's promote the kind of cleanups that we want to see.

I'd like to extend those lessons to the future and to this approach. Some day—and I hope soon, Senator—you and your Subcommittee are going to have to try to tame the CERCLA tiger. There's a crying need to do that—I hope this is a good start and we want to work with you on that.

"How can we learn from this?" is the question, "How can we do more to make the voluntary approach work?" Not only take that glass that's half full, but fill it up all the way and promote the voluntary cleanup success. I'd like to make a few suggestions and add to what Senator Boxer pointed out earlier regarding her experience as a county commissioner. Try to remove the Federal bureaucracy as much as possible.

Suggestion one: It's been talked about here all morning, and that is, what is a lightly contaminated site? Which sites should be excluded and which not? A simple suggestion is that the applicability of your program be to any site managed under an authorized program. To our way of thinking, this means that if a State has their own program, or if there's a Federal delegation, it may or may not choose to include a site. Mr. Weiner already addressed this in saying that after going through the NPL list, if the site was not on the Federal list, the State makes a judgment as to whether it is an enforcement action or a voluntary action. That's an excellent way of going about cleanups in our judgment.

If your program applies to any site under any authorized program with the State's discretion to include it or not, you won't get hung up on definitions—what is "lightly contaminated," what is "minimally contaminated"—and we'll clean up the sites that need to be cleaned up.

Senator you spoke also this morning on the issue of the finality of cleanups. I'd like to state how important we think this is. Yes, there's nothing certain—I will reiterate that—my father taught me the only things certain are death and taxes. What we can do, I think, is to make cleanups as certain as much as we can—

Senator LAUTENBERG. I don't know about death.

[Laughter.]

Dr. ALTER. I didn't want to push that too far, Senator.

I think we can establish make some sort of sign-off, like Mr. Weiner described, or like has been done in Oregon, barring, of course, significant new findings. If there are such findings, and they pose a threat, the settlement is not final.

I must disagree with Mr. Weiner on one point, the RCRA obstacles. He said RCRA was not an obstacle in New Jersey, which is the first time that I have heard that. RCRA is tough, there's no question about it, whether it be LDRs or MTRs or XYZs or PDQs. People are always struggling with the severe regulatory regime. We get a lot of member complaints about RCRA barriers.

We believe there is an opportunity to exclude sites from RCRA Subtitle C, under State-supervised voluntary cleanups, and we'll be happy to work with the staff to do this.

In conclusion, we'd like to point out and add our voices that S. 773 is a valuable contribution to the National efforts to clean up contaminated real estate. The country raised its standards of environmental acceptability of previously used industrial sites and this has created the need for the kind of program in S. 773.

Permitting a voluntary program with State oversight will no doubt clean more sites than any other approach. At the same time, we trust that the programs will not be smothered in bureaucratic layers or drowned in inappropriate RCRA requirements. S. 773 has the clear potential to achieve all of this.

Thank you very much.

Senator LAUTENBERG. Thank you very much, Dr. Alter.

Let me ask Ms. Hill and Mr. O'Brien about the question of the ironclad release. In your experience is a release from liability essential to making a voluntary cleanup program work?

Ms. HILL. It's desirable but, no, Senator, it's not essential.

Mr. O'BRIEN. I might add, Senator, in Illinois the law allows a release, but upon entering the program there's no promise that Illinois will grant a release in the event the cleanup is successful.

Senator LAUTENBERG. So, it hasn't proven to be an obstacle. It's desirable, but I think both of you were fairly clear, as were other witnesses, that it's not really final if conditions change, but for all practical purposes.

I asked my assistant, Leonard, who is an attorney as well as an expert on some of the environmental issues that we work with whether or not—and I'm not a lawyer, so we start off with that knowledge—when one goes into court in the event of an action being taken, and one cannot prevent an action from being taken, does the "good grounds keeping seal," or whatever we want to call it, make a significant difference, in evidence presented, that would say that we've done what we're supposed to do and that the action is unwarranted, frivolous, or otherwise—it does really help kind of cement the condition doesn't it?

Mr. O'BRIEN. Senator, if I might answer that by providing the same advice that I provided to the client who did the cleanup that I spoke about, when asked, "Will this release, if we get it at the end of the day, protect us?" The only advice I could give is that it's unrealistic to expect that in the event that something turns up that we didn't know about or in the event that there's contamination that we didn't expect to find, that piece of paper would prevent the State from coming forward and saying that more needs to be done, whether that's in a court or an administrative proceeding. That's a risk that you just have to take.

Senator LAUTENBERG. But, that assumes a change in condition. That has to be proven, right?

Mr. O'BRIEN. That's right, Senator.

Senator LAUTENBERG. But the fact that, again, to use the expression that I just coined, and that is the "good grounds keeping seal"—if you have that seal, if you have the letter or the certificate that's signed off by the State agency, it becomes pretty hard, I

think, for someone who would bring a suit that doesn't have a lot of merit, to move the action along, doesn't it?

Mr. O'BRIEN. I think that's right. And, the bill doesn't prohibit the State from giving that sort of good grounds keeping seal of approval.

Senator LAUTENBERG. Our bill doesn't contain any provision for special cleanup standards, and we've discussed this at some length this morning, that would apply to voluntary cleanups. Do you think that this approach is an impediment, in any way, to voluntary cleanups? Anybody? Ms. Hill?

Ms. HILL. Oregon has cleanup standards for soil.

Mr. O'BRIEN. I would just add, Senator, that I feel very strongly that the bill should not include National standards for cleanups because it's that very flexibility at the local level that makes this program practical. I would find that an impediment.

Dr. ALTER. I would add a voice to that, Senator. The bill votes a risk assessment, site-specific. I have a lot of faith in many States and their staffs. Together, that flexibility will make it work.

Senator LAUTENBERG. Mr. Early? Mr. O'Brien?

Mr. EARLY. Senator, I agree for a slightly different purpose. I think it's very important that the main target of this bill be low-level contamination sites and to the extent that it attempts to address sites that pose real threats to the public health and the environment, then the Sierra Club is going to support putting some cleanup standards in here. Then you're involved in a debate over what the cleanup standards ought to be. Pretty soon the bill gets bogged down in a debate over what ought to be the cleanup standards in Superfund.

We need to keep this bill lean. We need to keep this bill simple. That means that it isn't going to be ambitious in terms of the kinds of sites that it may address. We're talking about sites where there's a broad consensus that they really don't pose a meaningful threat to health and the environment, but by mere virtue of the fact that there is contamination, the developer or the owner is reluctant to use that property for productive purposes—that's the kind of site we want to get out of the way.

Quite frankly, the site that Mr. O'Brien described, that was a wood treatment site, may not fall into the category of the kind of site that I think this program should be targeting. That doesn't mean that it shouldn't be cleaned up under a State program, but it isn't what I would identify as the ideal target site, because wood treatment sites are frequently very significant threats to the public health and environment and they need to be cleaned up under adequate standards. If Illinois has those, that's fine, but we don't want to promote the cleanup of dangerous sites in States that don't have standards.

Senator LAUTENBERG. Mr. O'Brien, what have the overall economic benefits been for your clients who participated in the voluntary cleanup program?

Mr. O'BRIEN. Well, Senator, certainly in Illinois we've already seen 300 sites in the program, 39 of which have gone through successfully. The best that I can point to is the site that we just spoke about. It was very clear that there were 2500 jobs at risk that weren't, if I might say, "flipping hamburgers". These were design

and engineering and production jobs in which a lot of highly skilled and highly paid workers were involved and the expansion of the campus added on an additional 500. So, I can point to one success of 3000 very good jobs in Illinois.

Senator LAUTENBERG. How about any failures? Have you seen any failures result from a voluntary cleanup program that people participated in, that were disappointing in the outcome?

Mr. O'BRIEN. I think there were a couple of sites where the more the program looked like the Superfund program, meaning going through with a series of set cleanup standards from a National perspective as opposed to how we deal with it at the State level, people have become frustrated because the process takes too long and doesn't address what it's supposed to do and that's to provide economic redevelopment.

Senator LAUTENBERG. So, where we've seen it in place, there's relatively, I would take it, little dissatisfaction with the outcome of these voluntary cleanup efforts.

Ms. HILL. Dissatisfaction, Senator?

Senator LAUTENBERG. Very little dissatisfaction.

Ms. HILL. Very little dissatisfaction. In fact, the Oregon program doesn't require somebody to continue through it. We don't have a provision that you can't renege. Our program says that if you get in it and you don't like it, you can drop out and we'll get back to you when you pop up on our list again. I don't believe they've had anybody drop out.

Senator LAUTENBERG. Otherwise, that site just sits dormant.

Ms. HILL. Right.

Senator LAUTENBERG. S. 773 establishes a low interest loan program to help owners clean up their property. Have you seen the owners applying to private institutions for loans to do cleanup work?

Ms. HILL. We haven't seen a lot of loan applications for it. My understanding, from talking with attorneys who represent clients going through the program, is that generally part of the way they go through is to pay for the cleanup, in stages, out of cash flow, so that it's not a significant hit to the company. We've seen one or two, but we haven't seen a lot of them.

Senator LAUTENBERG. Not much. Which way do you think would be more effective to run the loan program—direct loan or guaranteed by the State or Federal Government?

Ms. HILL. That's a difficult question, Mr. Chairman. I don't believe that the ABA has a position on it, although I'd be happy to get back to you with a position statement.

Mr. EARLY. Mr. Chairman, I'd like to make a comment on this. When I first read your bill, I kind of assumed that one of the principal values of the low interest loan program would be to be, essentially, a loan program of last resort for cleanups and redevelopment of sites that are in disadvantaged and economically depressed communities.

As you know, there has been a growing body of evidence that our Federal environmental laws are not helping out our disadvantaged and minority communities nearly as effectively as they protect and help other communities that aren't disadvantaged. I think it would be very important to assure that this program be operated in a

fashion that, in fact, targets disadvantaged communities and operates in a way to help the redevelopment of those communities. It seems to me, that if that's an important goal, you really do need to have this either be a direct loan program or have criteria that assure that if the State is operating it, that it has that effect.

Senator LAUTENBERG. If it's not direct, but the guarantee is reliable, that's pretty much the same thing.

I agree with you, by the way. Unfortunately, Blake, a lot of these sites are urban based because that's where the production took place in so many cases. That also is a place where there is some value to be obtained. We are all reexamining environmental statutes to see whether or not something now often called "environmental justice" applies as an integral part of review and legislation, to be done in terms of not locating incinerators, et cetera, in areas that might have an interest in jobs, but really are taking a significant exposure to environmental damage or health damage. So, the point is a good one.

Mr. O'BRIEN. Senator, if I might just add one point about lenders lending money into voluntary cleanup programs. Last year, I worked on transactions totalling about \$5.4 billion, as special environmental counsel. We did loan money to companies and specifically wrote into the documents, "You must enroll your site into the Illinois voluntary cleanup program" and the lender helped fund that cleanup. But, I should probably note, too, that we did have some concern and it's a very difficult process to do that because of some of the lender liability issues that arise with becoming involved with a borrower that's actually in a cleanup. There are tensions that go both ways, not necessarily dealt with by this bill.

Senator LAUTENBERG. I thank all of you for being with us today. It was very helpful. S. 773 will continue to move along, we hope, and if any of you have anything that you'd like to volunteer to us as a result of what you've heard today or observations that you come upon, please submit it.

I thank you very much for your participation.

With that, this hearing is adjourned.

[Whereupon, at 11:40 a.m., the subcommittee adjourned, to reconvene at the call of the Chair.]

[Statements submitted for the record and the bill, S. 773, follow:]

STATEMENT OF
ROBERT M. SUSSMAN
DEPUTY ADMINISTRATOR
U.S. ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE
SUBCOMMITTEE ON SUPERFUND, RECYCLING
AND SOLID WASTE MANAGEMENT
OF THE
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
U.S. SENATE

JUNE 17, 1993

Mr. Chairman and Members of the Subcommittee: thank you for the opportunity to appear today to discuss the issue of voluntary cleanups. The Environmental Protection Agency (EPA), in taking stock of its hazardous waste programs, has been looking for ways that the Agency, State governments, local communities, and private businesses can work together more cooperatively as partners in cleaning up contaminated sites.

The understanding of the impacts of environmental laws and regulations has begun to change corporate and municipal behavior by giving incentive to undertake voluntary actions. Because private and public parties now are more aware of the problems -- and costs -- associated with the generation and disposal of hazardous wastes, they are developing new, innovative ways to prevent pollution before it is generated, and minimize pollution that cannot be prevented completely. Moreover, because the presence of hazardous wastes can impair the value of businesses or corporate property, more and more private companies are conducting voluntary cleanups prior to the sale of corporate assets. In these cases, voluntary actions in the private sector are providing additional, indirect environmental benefits in addition to those attained by EPA's

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programs directly. Voluntary cleanup programs provide a realistic alternative to the current system of hazardous waste cleanup for low-priority sites.

Voluntary cleanup of low-priority sites will also encourage private investment that will stimulate economic growth in older urban areas. Many of these sites are in the neighborhoods of minority populations. Voluntary cleanups will protect the public health, while encouraging job creation in such areas.

We applaud the Chairman's efforts in introducing S.773, the "Voluntary Cleanup and Economic Redevelopment Act of 1993." EPA supports the concept of voluntary cleanup and is developing a strategy to work with States in a number of ways to promote the development and implementation of State voluntary cleanup programs.

EPA has been doing what it can to change things administratively. EPA is exploring a voluntary cleanup strategy to encourage the development of new, or enhance existing, State voluntary cleanup programs for primarily non-NPL caliber sites, and explore options for Federal involvement.

The bill creates three programs: 1) the Voluntary Cleanup Grant Program, which provides grants to States to establish or expand a State voluntary cleanup program; 2) the Site Characterization Grant Program, which provides grants to local governments to conduct site assessments of specific sites with demonstrable economic potential; and 3) the Economic Redevelopment Loan Program, which provides loans to owners or prospective

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purchasers of sites with economic potential to cleanup and redevelop the sites.

Voluntary Cleanup Grant Program

The Voluntary Cleanup Grant Program will help alleviate the delay in cleaning up low priority sites. The universe of contaminated sites that require some level of cleanup is larger than EPA or the States can currently address. EPA and States must direct their limited resources toward sites that pose a greater risk. Low-priority sites, therefore, may wait for years before cleanup decisions are made or actions commence. This may contribute to potential commercial purchasers choosing to develop pristine and uncontaminated areas (also known as "green fields") rather than face the potential uncertainties associated with redeveloping contaminated areas. The flight to green fields may have an especially significant effect on urban and suburban centers -- contamination remains and, as a result, economic activity is retarded.

Private industry and citizens have long expressed a need for EPA to recognize and facilitate voluntary cleanups, particularly at contaminated sites that are not yet, and may never be, addressed under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) or the Resource Conservation and Recovery Act (RCRA). The Voluntary Grant Cleanup Program could help to expedite the cleanup of many sites that pose relatively low environmental risks and might not otherwise be addressed by EPA in

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the near future, and by doing so, could facilitate the economic redevelopment of these properties.

A number of States have already taken the initiative in developing and implementing their own voluntary cleanup programs. While these programs have made progress in addressing contaminated sites, they differ in their scope, nature, and maturity. Many States wish to expand their existing programs, while other States have not even begun to develop a voluntary cleanup program. Although most State voluntary cleanup programs require that the private party reimburse the State for its oversight costs, several States lack the initial funds to hire and train personnel for a voluntary cleanup program. The result is a patchwork of voluntary cleanup initiatives that have not reached their full potential in addressing contaminated sites.

We believe S. 773 provides potential mechanisms for States to begin the development of new or enhancement of existing voluntary cleanup programs. Under this legislation, grants will be provided to States for programs that address sites which are a low priority to EPA. The State programs funded by the bill would accelerate the rate at which risk to the public and the environment is reduced at a larger number of sites. In addition, voluntary cleanups would alleviate the economic burdens imposed on private parties associated with ownership of contaminated sites, easing the credit restrictions, and facilitating property transfer and redevelopment.

This legislation certainly is a positive first step in encouraging the development of new or the enhancement of State

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voluntary cleanup programs. EPA supports the concept of voluntary cleanup and much of this bill.

With this support in mind, we need to look at what changes might be necessary in order to make S. 773 even more effective. The scope of the legislation needs to match its purpose of applying to low priority sites. The universe of sites eligible for voluntary cleanup defined by the bill may be interpreted too broadly in some respects and too narrowly in others. For example, the definition of "affected sites" in the bill should be clarified to include those contaminated sites where a Preliminary Assessment under the Superfund program has been undertaken and a decision was made not to take any further action at the site. These low-priority, non-NPL caliber sites may be currently excluded from the legislation. EPA believes that State voluntary cleanup programs are an appropriate mechanism for addressing these sites which are currently left to the States under the Superfund program.

On the other hand, the universe of eligible sites should not include certain sites that, although not yet evaluated or addressed under CERCLA and RCRA authority, are highly contaminated. We believe the legislative language should be clarified such that these sites are not included in the Voluntary Cleanup Grant Program.

Another aspect of the bill requiring clarification is the section that addresses cleanup standards. One part of the bill provides that voluntary cleanups only need to reduce risk "to the satisfaction of the State," while another part of the bill requires

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cleanups to be completed "in accordance with all applicable Federal and State requirements." In attempting to eliminate the ambiguity in the current language, we should carefully consider which standards might be most appropriately applied to the voluntary cleanup of these sites.

We are also concerned with EPA's role in reviewing State grant applications for voluntary cleanup programs. Although EPA clearly has discretion in determining the amounts to be given to grant recipients, and the right to terminate a grant at any time if it determines that the State's program no longer meets the bill's requirements for a voluntary cleanup program, the language is ambiguous as to the level of discretion EPA will have in deciding whether to initially approve or disapprove State grant applications for voluntary cleanups. It may be unwise to limit EPA's ability to deny grant applications. EPA needs some discretion in managing the grant program if we are to be answerable to Congress for the use to which grants are put.

Finally, this legislation is a good start towards encouraging voluntary cleanup in the States. While structural impediments in Superfund and RCRA remain, any changes to these statutes should await reauthorization and should not be contemplated in this legislation.

Site Characterization Grant Program

The second program in the bill, the Site Characterization Grant Program, would provide for a mechanism to help local governments to conduct site assessments to determine the

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feasibility of voluntary cleanups at these sites. This program would give needy local governments the tools to decide initially whether a site should be a voluntary cleanup site. The program would also provide needed information about the site for obtaining loans to be used for voluntary cleanup of the site, or for facilitating the sale of the site. While EPA believes that this program has merit, EPA does not believe it has the expertise to make the economic development potential determinations.

Economic Redevelopment Assistance Program

The third program in the bill, the Economic Redevelopment Assistance Program, would provide low-interest loans where traditional lending mechanisms are not available for owners, prospective purchasers, or municipalities to help them conduct a voluntary cleanup action.

While this proposal is an interesting concept, the Administration is not prepared to take a position on it at this time for several reasons. First, two sections of the legislation require EPA to address real estate and economic issues and provide loans based on "economic redevelopment potential" determinations. EPA does not possess the expertise to make these determinations. In addition, EPA would be responsible for collections and enforcement actions relating to redevelopment loans. These kinds of enforcement actions at voluntary cleanup sites would divert substantial resources from EPA's existing statutorily-mandated enforcement responsibilities.

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Given the fact that many of the activities required to operate this program successfully could be deemed to fall outside of EPA's current environmental protection mission, it may well be desirable to involve other Federal agencies directly in the administration of any direct loan program in support of voluntary cleanups.

It may also be preferable for the loan program to provide market-rate, rather than subsidized loans. This would address the problem of unavailability of loans for cleanup of such sites, but would eliminate the incentive on the part of borrowers to inappropriately use this program to obtain subsidies.

There may also be more effective methods of addressing the problem of unavailability of capital for cleanup of low-risk sites. We also need to think through whether EPA could run into lender liability problems if it is both a direct lender, and a manager (regulator) of a site.

These are issues that we need to discuss further within the Administration before taking a position on this section of the bill.

In addition, the legislation does not include an authorization for funding to assist EPA with the additional administrative burden of executing its responsibilities under the bill. EPA and other Federal agencies would also need resources to develop guidelines for the review and approval of applications, and for the administering of grants. EPA would also like to ensure an effective dialogue with and funding for the States so that current

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State cleanup resources are not diverted away from addressing the worst sites first and toward a voluntary cleanup program.

Finally, during these difficult fiscal times, finding funding in EPA's budget for programs such as this may be difficult, and may even need to be taken from the Superfund program. Currently, under the bill, States are required to assume responsibility for cleanups not completed by private parties. EPA believes this is a significant burden on States; however, EPA believes that if this requirement is removed, some State match for the grant program would be appropriate, as is typical in other environmental laws.

Conclusion

With these comments in mind, EPA views S. 773 as a positive step in promoting environmental restoration and economic redevelopment by facilitating the development of effective and efficient State voluntary cleanup programs. The voluntary cleanup approach has the potential to benefit many parties. Property owners would benefit in that voluntary cleanups could make property available for sale or redevelopment. The relationships between EPA and the States would benefit from the encouragement of a cooperative approach in cleaning up contaminated sites and the fostering of a true partnership. Most importantly, however, the public would benefit through the reduction of risk posed by contaminated sites at a pace which is much faster than the current RCRA and CERCLA processes allow.

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Mr. Chairman, thank you for this opportunity to address the Subcommittee. I will be happy to answer any questions you may have.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUL 27 1993

OFFICE OF CONGRESSIONAL
AND LEGISLATIVE AFFAIRS

Honorable John Chafee
U. S. Senate
Washington, D.C. 20510

Dear Senator Chafee:

Enclosed for insertion in the hearing record are EPA's responses to questions you submitted to Assistant Administrator Sussman arising from the June 17th hearing concerning Superfund voluntary cleanup.

If we can provide further assistance, please do not hesitate to contact me.

Sincerely,

A handwritten signature in dark ink, appearing to read "Thomas C. Roberts", with a large, sweeping flourish extending from the end of the signature.

Thomas C. Roberts
Director
Legislative Analysis Division

enclosure

Questions for Deputy Administrator Sussman - Voluntary Cleanups

1. As you know, several states have already developed their own voluntary cleanup programs.

Question: Is there a particular State or States that have developed especially good programs in EPA's view? If so, what are the specific elements of those programs?

Response: EPA is working with the Association of State and Territorial Solid Waste Management Officials (ASTSWMO) in gathering information and attempting to gain a clearer picture of the number of states that have developed and are implementing voluntary cleanup programs and what the components of those programs are. A number of states such as New Jersey, Oregon, and Massachusetts have well established programs in place which seem to be acceptable to both private parties and the local lending communities. EPA has begun to look at those and other state programs and has identified elements which are common to successful state voluntary cleanup programs. For example, some of these state programs are set up on a "fee for service" basis whereby the private parties pay for the investigation and cleanup of the property as well as all state oversight costs. A second example is the availability of guidance for the private parties to follow in conducting investigations and cleanups.

2. When this bill was introduced, I stated that, while I supported the limited incentives that this bill provides for voluntary cleanups, we should also during the Superfund reauthorization be seeking to eliminate the disincentives that the program provides for economic redevelopment of industrial sites.

Question: Is it EPA's view that Superfund, and indeed RCRA, are obstacles to economic redevelopment? If so, what ideas do you have to encourage voluntary cleanups in those programs?

Response: Yes, potential hazardous waste liability can be a barrier to redevelopment of contaminated properties in that the owners or prospective purchasers of these properties may encounter difficulties in securing loans, insurance, and transfer of the property.

Sites that are cleaned up under the RCRA or CERCLA programs eventually become available for redevelopment. The problem is the number of sites that must wait in the queue for years before a decision can be made as to whether Federal action is warranted.

Questions for Deputy Administrator Sussman - Voluntary Cleanups

State voluntary cleanup programs which address lower priority sites allow these sites to be cleaned up at a much faster pace, reducing risk more quickly and making such sites available for economic redevelopment much sooner. EPA sees many benefits to State voluntary cleanup programs and would like to provide both "seed" money and technical assistance to the States to encourage the development and implementation of State voluntary cleanup programs.

It should be noted, however, that S.773 does not address CERCLA sites or sites subject to RCRA corrective action. Impediments that are not removed by S.773 include RCRA regulatory requirements such as permits that may be required for cleanups at these non-RCRA or non-CERCLA sites.

3. As you know, this bill provides incentives for voluntary cleanups at a limited number of "minimally contaminated" sites. Specifically, the bill excludes Superfund sites, as well as any site that is subject to corrective action under RCRA.

Question: Has EPA issued any legal opinion that would define exactly what sites are subject to "corrective action" under RCRA?

Response: No. EPA has not issued a specific legal opinion that defines exactly which sites are subject to "corrective action" under RCRA. However, there are Agency opinions, policies, preamble, and regulatory language and judicial opinions which do express the Agency's current position regarding the universe of sites subject to corrective action under RCRA. Copies of these documents are included (see Attachment I).

The potential number of sites subject to RCRA corrective action is quite large and includes: permitted facilities and facilities seeking permits, including facilities required to have operating or post closure permits or permits by rule; interim status facilities; facilities that should have had interim status and facilities at which interim status has been terminated; and proposed new facilities.

Question: What is the scope of the exclusion of RCRA sites in the bill. (Stated another way, does the exclusion in the bill mean that virtually no sites will be covered by the voluntary cleanup programs created by S.773?)

Questions for Deputy Administrator Sussman - Voluntary Cleanups

Response: The exclusion in the bill does cover a large number of RCRA sites subject to corrective action under Section 3004(u) or 3008(h) of RCRA. This includes treatment, storage and disposal facilities (TSDFs). However, there are other RCRA sites (e.g., RCRA generators) which currently manage or have managed hazardous waste that would still be eligible for assistance under the language provided in the bill. Nonetheless, certain generators, if they have had systematic and routine releases of hazardous waste, subsequently may be deemed a TSDF and become subject to RCRA corrective action.

The Agency interprets the language in Section 3(2)(B)(iv) of the April 3, 1993 version of S.773 to mean that sites which are not subject to RCRA corrective action under Section 3004(u) or 3008(h) at the time that an application for a grant or loan concerning the site is submitted under the Act will still be eligible for a grant or loan even if the ultimate cleanup action will require a RCRA permit.

It should also be noted that RCRA permitting requirements may apply to any site which treats, stores or disposes of hazardous waste during a voluntary cleanup action. While such requirements may create a disincentive to voluntary cleanups, it is the Agency's understanding that these sites would nonetheless be eligible for financial assistance under this bill.

Question: If EPA has not issued an opinion on this issue, could the General Counsel provide us with one on this questions?

Response: The Agency's legal position is expressed in the aforementioned policies, preamble and regulatory language which is included (see Attachment 1).

4. Question: Does S.773 provide EPA with adequate resources to perform the duties of the agency imposed by the bill?

Response: As the S.773 is currently drafted, EPA is responsible for the administration of three programs: 1) the Voluntary Cleanup Grant Program; 2) the Site Characterization Grant Program; and 3) the Economic Redevelopment Loan Program. S.773 does not include an authorization for funding to assist EPA with the additional administrative burden of executing its responsibilities under the bill. EPA and other Federal agencies would also need resources to develop guidelines for the review and approval of applications, and for the administering of grants. Finally, during these difficult fiscal times, finding funding in EPA's budget for programs such as this may be difficult, and may even need to be taken from the Superfund program.

Questions for Deputy Administrator Sussman - Voluntary Cleanups

5. **Question:** On page 6 of your written testimony, you state that "While structural impediments in Superfund and RCRA remain, any changes to these statutes should await reauthorization and should not be contemplated in this legislation." Why, if in your view S.773 only addresses a small part of the voluntary cleanup issue, do you advocate going forward with S.773 at this time, rather than addressing the entire issue of voluntary cleanups in the context of Superfund and RCRA reauthorization?

Response: EPA views S.773 as a positive first step in encouraging the development of new or enhancement of existing State voluntary cleanup programs. A number of States are interested in developing voluntary cleanup programs but lack the initial funding. Going forward with S.773 at this time allows States to get programs up and running and could provide EPA with valuable information and State input for reauthorization of CERCLA and RCRA. S.773 will allow the development of these programs to proceed while EPA prepares for CERCLA, and then RCRA, reauthorization.

Attachment #1

The following documents provide information on the the scope of EPA's corrective action authority:

1. Excerpt from Codification Rule. 50 Fed. Reg. 28702, 28711-28716, (July 15, 1985).

This excerpt explains the scope of corrective action requirements under sections 3004(u) and 3008(h). Among other things, the preamble explains that the corrective action authority in section 3004(u) applies to facilities seeking a permit under Subtitle C, including post-closure permits as well as operating permits. The definition of "facility" extends to all contiguous property under the owner or operator's control.

2. Excerpt from Dec. 16, 1985 memorandum by J. Winston Porter on Interpretation of Section 3008(h) (pp 3-13).

This memorandum further explains the scope of corrective action requirements under section 3008(h). The excerpt explains the definition of "facility" as applied to section 3008(h), and also explains that section 3008(h) authority applies not only to facilities that qualified for interim status, but also to facilities that should have had interim status, and to facilities at which interim status has been terminated.

3. Excerpt from UTC v. EPA, 821 F.2d 714, 720-723 (D.C. Cir. 1987).

This case upheld the Codification Rule's interpretation of "facility" (item 1 above).

4. Administrator's decision in Navajo Refining Co., RCRA Appeal No. 88-3 (June 27, 1989).

This opinion applies the definition of "facility" under section 3004(u). It holds that corrective action authority under section 3004(u) extends to areas under the permittee's control even when the permittee does not own the area.

5. Excerpt from proposed rule on corrective action for solid waste management units (SWMUs) at hazardous waste management facilities. 55 Fed. Reg. 30798, 30808 (July 27, 1990).

The proposal includes language to codify the definition of "facility" for corrective action purposes and asks for comment on how to define "control" for purposes of the definition.

6. Excerpt from final rule on corrective action management units and temporary units. 58 Fed. Reg. 8658, 8664, 8683 (Feb. 16, 1993).

Among other things, this rule codifies the definition of "facility" for corrective action purposes to include "all contiguous property under the control of the owner or operator seeking a permit under subtitle C of RCRA. This definition also applies to facilities implementing corrective action under RCRA Section 3008(h)." This rule finalizes part of the July 27, 1990 corrective action proposal (item 5 above). (Note: two petitions for review of this rule were filed within the 90-day filing deadline. One petitioner has raised the issue of whether EPA has authority under section 3008(h) to require corrective action for all contiguous property under the control of the owner or operator.)

[NOTE: The documents referred to on this attachment have been retained in committee files.]

Senate Environment and Public Works Committee
Subcommittee on Energy and Environment
Voluntary Cleanups - S. 773 (Lautenberg)
June 17, 1993

Scott A. Weiner, Commissioner
N.J. Department of Environmental Protection & Energy

Good Morning Senator Lautenberg and members of the subcommittee. My name is Scott Weiner. I am the Commissioner of the New Jersey Department of Environmental Protection and Energy. It is my pleasure to be here today to discuss S. 773; a bill which, based on New Jersey's experience in establishing a voluntary cleanup program, will be effective in achieving the dual goals of facilitating economic revitalization of contaminated properties and reducing impacts to human health and the environment of contaminated properties. This program will facilitate the creation of jobs by getting contaminated sites back into productive use.

I would like to give some history on the evolution of New Jersey's voluntary cleanup program. There are several federal and state authorities under which the Department remediates contaminated sites - the federal Superfund and RCRA programs, the federal and state UST programs, the state Spill Compensation and Control Act and the Industrial Site Recovery Act (ISRA - New Jersey's state property transfer law).

The federal Superfund and state Spill Act Programs both are risk based programs. Sites are remediated on a "worst-first" basis. The ISRA, UST and RCRA programs establish categorical remedial priorities for the universe of sites which are subject to these laws. The UST and RCRA programs have statutory authority or regulatory timeframes for the remediation of sites covered by each statute. ISRA requires remediation at a sale or closure of an industrial property to prevent the transfer of contamination from one generation to the next.

All of these programs have been extremely successful in remediating contaminated sites in New Jersey. Approximately 50% of the sub-sites at our state's NPL sites have been, or are nearing completion. Since 1983, the ISRA program has been responsible for roughly 3000 site remediations. Finally, our privately funded cleanup program oversees approximately 7,000 cleanups at any one point in time.

Yet, there was a need to establish a program which would accommodate the needs of others who wanted to remediate a site which did not fit into any of the previously discussed programs. For example, a property owner approached me early in my tenure as Commissioner with a dilemma. This developer had owned a site in New Jersey which was suitable for a potential project. However, the site was contaminated prior to his ownership. Knowing that remediation would be required, the developer came to the Department volunteering to clean up the site to the Department's standards, and would pay for the

Department's oversight. The Department's response was to offer an Administrative Consent Order -- a binding enforcement document with time schedules, stipulated penalties and financial assurance requirements. Because this developer was not in any way responsible for the contamination at the site, requiring the use of an enforcement document was actually an impediment to the remediation and redevelopment of the site; something which both the developer and the Department desired.

It became apparent that the Department had no program to accommodate property owners, developers or others who wanted to voluntarily remediate or investigate a contaminated, or potentially contaminated site and receive Department approval that any remedial work was done correctly and/or that no further action is warranted. It also became apparent that such a program was sorely needed.

In response to these needs, the Department developed New Jersey's Voluntary Cleanup Program. Under this program, any person may enter into a non-binding agreement (Memorandum of Agreement, or MOA) with the Department. A person can withdraw from the agreement at any time. The person requesting the MOA controls how much, or how little, Department oversight is required. They also control what type of remediation they wish to undertake - investigation only, full site review, or review of only one, or several areas of concern at a site as long as all work is performed in accordance with the Department's remediation regulations and standards.

In exchange for providing review and evaluation services, the person who is party to the agreement with the Department agrees, as part of the MOA, to pay the Department's costs in reviewing any work submitted. The Department must charge fees for these reviews because the Site Remediation Program is entirely self-sufficient; it receives no general state appropriation.

Since the inception of the program in 1992, the Department has executed over 650 MOA's with parties to remediate contaminated sites. Ninety percent of these MOA's are for full site investigations, and, if necessary cleanup. In the last year, over \$10 million have been expended to clean up sites under our voluntary cleanup program. Our voluntary cleanup program is proving to be a vitally important companion to our risk-based and categorical programs. The voluntary cleanup program is effectively performing several functions: reserving scarce public funds for the "worst" sites; creating jobs in the environmental remediation and construction field; creating jobs in the service and manufacturing sectors at sites which had previously lain fallow; and getting delinquent properties back into productive use.

I would like to offer some specific examples of success stories.

Hackensack DPW Yard & Former Petro King (Hackensack) - is being remediated to create a large scale wholesale operation called "Price Club" and a new, state of the art public works depot.

Potential jobs include those created by the remediation of the site, including consultants, laboratory personnel and heavy equipment operators. Potential jobs created by the reuse of the property will be sales and warehouse related employment.

Waverly Yards (Newark) - is being remediated by Hartz Mountain Industries of Secaucus New Jersey so that redevelopment of this 54 acre site into an Industrial Warehouse Storage Park can occur. This will provide the City of Newark with tax ratables as well as opportunities for employment.

Jersey City Medical Center - Jersey City - is to be constructed on this 100 acre site that was formally a landfill, chemical drum facility, and automobile demolition area. The remediated site will be used for a branch of the Jersey City Medical Center and the Hudson Community College.

Princeton Industrial Properties (West Windsor, NJ) - is being remediated to provide a location for both large and small office buildings adjacent to the Route 1 corridor. Potential jobs created by the investigation and remediation include: consultants, laboratory personnel, and heavy equipment operators. Potential jobs created by the reuse of the property include office related employment and may number several hundred jobs for the state.

Roebline Wire Works (Trenton, NJ) - is being remediated for the development of a downtown shopping center, office complex and

museum. Potential jobs again include consultants, laboratory personnel, heavy equipment operators. Once the conversion of the site is completed, jobs related to a major food market, warehouse personnel, office employment and other employment opportunities related to the operation of a strip mall and a museum will be available.

Prior to the initiation of the voluntary cleanup program, our state already had a highly developed Site Remediation Program with an existing infrastructure to support the addition of this new initiative. Other states may not be in this position. S.773 will be a critical tool for providing other states with the framework and financing needed to establish such a program. One of the primary benefits of S.773 will be the further development and enhancement of state capabilities. S.773 appropriately recognizes the importance of providing seed money to assist states in establishing voluntary cleanup programs.

In addition, S.773 will foster and encourage the remediation of non-NPL sites, and sites not subject to existing state programs. As I discussed earlier, most states have enforcement based, risk driven remedial programs. However, there are many sites across the country which lay fallow because of existing or potential contamination; sites which developers want to explore, which municipalities want to get back on the tax rolls, and which contain the potential for creating jobs. This is a win-win proposition. A federal program to encourage the

development of voluntary cleanup programs will consequently result in the facilitation of redevelopment of contaminated properties for economic and other business purposes.

S.773 establishes appropriate roles and responsibilities for sites which the state or federal government are not currently addressing thereby ensuring the most effective use of government resources. The responsibilities of EPA in awarding grants for State voluntary cleanup programs needs to be more specific in defining EPA's role in specifying individual state voluntary cleanup programs. I would respectfully suggest that EPA's role should be to set general program criteria to be met prior to the allocation of federal funds to implement a voluntary cleanup program. On the other hand, EPA must maintain appropriate financial auditing authority in recognition of its fiduciary role in managing public funds.

With these and other minor technical changes, which have been previously transmitted to your staff, the bill is ready to move forward through the legislative process. We are hopeful that this bill will progress quickly and be enacted in the very near future.

In closing, I thank you for the opportunity to be here today to share New Jersey's experience with voluntary cleanup programs and to extend the Department's full support for S.773.

STATEMENT

OF

ANNE PENDERGRASS HILL
VICE PRESIDENT AND SENIOR COUNSEL,
FIRST INTERSTATE BANK OF OREGON, N.A.

FOR

THE AMERICAN BANKERS ASSOCIATION

ON

S. 773, "VOLUNTARY ENVIRONMENTAL CLEANUP AND
ECONOMIC REDEVELOPMENT ACT OF 1993"

BEFORE THE

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

SUBCOMMITTEE ON SUPERFUND, RECYCLING
AND SOLID WASTE MANAGEMENT

UNITED STATES SENATE

JUNE 17, 1993



AMERICAN BANKERS ASSOCIATION
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036

Mr. Chairman and members of the Committee, I am Anne Pendergrass Hill, Vice President and Senior Counsel for First Interstate Bank of Oregon, N.A., a subsidiary of First Interstate Bancorp. A substantial part of my in-house practice focuses on environmental matters. I am here on behalf of the American Bankers Association to comment on S. 773, the "Voluntary Cleanup and Economic Redevelopment Act of 1993." The American Bankers Association (ABA) is the national trade and professional association for America's commercial banks, from the smallest to the largest. ABA members represent about 90 percent of the industry's total assets. Approximately 94 percent of ABA members are community banks with assets of less than \$500 million. First Interstate is the twelfth largest commercial banking organization in the United States. Its 17 subsidiary banks hold total assets of \$49.0 billion and operate 996 offices in the 13 western states. Those banks are full-service banks providing a full range of banking services, including commercial loans and other real estate loans, the offering of which would be directly affected by S. 773.

As an industry deeply concerned about liability for lenders under state and federal environmental laws, but supportive of proposals that could improve economic development, we believe that S. 773 is a great first step toward easing our concerns. Your bill is based on successful state programs such as those that exist in Oregon, Illinois, and Massachusetts, where an owner of a contaminated site can volunteer to pay for the cost of oversight during remediation. In return, after remediation is completed, the state will issue a letter which will



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indicate to prospective buyers and lenders that "the property has been cleaned up to the government's satisfaction and that other parties need not fear for potential cleanup liability."

Bankers in jurisdictions where voluntary cleanup laws now exist are very aware of these successful programs and have urged enactment of a similar proposal at the federal level. For example, in my own state of Oregon, we have the Voluntary Cleanup Program (the "Oregon Program"), established in 1991. The Oregon Program clearly works. I was fortunate to have sat on the Voluntary Cleanup Initiative, the committee which helped develop the rules for the Oregon Program which provides the Oregon Department of Environmental Quality (DEQ) technical assistance and oversight to parties who voluntarily request assistance on cleanup projects. The voluntary relationship between DEQ and the volunteer means that the cleanup is generally quicker and therefore less expensive.

As you know, Mr. Chairman, the banking industry, and specifically the American Bankers Association, have long been advocates for fairness to lenders under the environmental laws. S. 773 could help address our liability concerns by setting the stage for government supervision of the development of previously neglected contaminated sites. This will be good for the environment and good for the local economy: a win-win situation. The purpose of my testimony here today is to address a lender's perspective on the Oregon experience.



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THE OREGON EXPERIENCE

The Oregon Program was created in 1991 to assist owners of property, including individuals, businesses, industries, municipalities and other governmental agencies, clean up hazardous substances released into the environment. The Oregon Program provides the Oregon Department of Environmental Quality (DEQ) technical assistance on necessary cleanup projects. The voluntary relationship between the DEQ and the volunteer means that the cleanup is generally quicker and therefore less expensive (since in most cleanups, time is money). Cleanup is also less expensive if the site qualifies as a "simple site" under the Oregon administrative rules setting soil cleanup standards for 70 hazardous substances because the clean up standard is already established. At the conclusion of the cleanup, the volunteer secures a DEQ sign-off, called a "no further action letter" or an "NFA" letter, that the cleanup was conducted properly. The NFA letter provides that the cleanup is satisfactory for the purposes of the contamination disclosed to DEQ, so long as the law remains the same. The Oregon Program is a full cost recovery program. The volunteer pays all of DEQ's costs, including overhead.

The Oregon Program is very successful. Even though it is a total cost recovery program, there is a long waiting list to be admitted to the program. There is no downside to the



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Oregon Program. Contaminated property is cleaned up at no expense to the taxpayer. That's good for Oregon and good for banking in Oregon.

THE BANKING PERSPECTIVE ON VOLUNTARY CLEANUP

The committee which assisted in drafting the rules for the Oregon Program discussed at length whether the "no further action" letter which DEQ issues at the conclusion of a cleanup, would be adequate or helpful for banks. That question exists because the NFA letter provides no protection against undisclosed contamination or later changes in the law, nor federal action concerning the same contamination. Banks would obviously prefer an ironclad sign-off from DEQ and EPA which would eliminate all risk in connection with the property. However, generally, neither agency appears to agree to an absolute safe harbor from liability. Also generally, it may not ultimately in the best interest of Oregon (or banking) to release a liable party. Otherwise, taxpayers might have to clean up contamination at a site because DEQ signed off prematurely while the level of remaining contamination was considered safe. Since complete elimination of liability is not likely, banks must, and can learn to, evaluate the risk of a later DEQ or EPA action by consulting with their own environmental and legal professionals. As a practical matter, it seems unlikely that EPA would turn its attention to a site which DEQ has previously declared



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"clean." If the nature of contamination at a particular site makes it likely that EPA will pursue future action on the site, its cooperation can be requested through the Oregon Program. Furthermore, it is unlikely that DEQ would revisit a site absent a compelling problem. Banks can evaluate those risks, and furthermore, I believe that banks will accept that risk in an otherwise appropriate circumstance.

In my research of the Oregon Program, I have learned that most cleanups take place and are paid for in stages out of cash flow. Nonetheless, I believe that participation in the Oregon Program would be a substantial factor in a borrower's favor were a borrower to apply for financing for a cleanup. Banks will be more likely to finance cleanups for good borrowers on otherwise valuable property with well-defined contamination if the cleanup is part of the Oregon Program. The risk of liability to the bank is reduced by the borrower's participation in the Voluntary Cleanup Program. DEQ oversight provides a degree of assurance that the cleanup was done properly and reduces the risk that the site will be revisited by DEQ or EPA. Close lender monitoring is not required, reducing or eliminating any concern for lender operator liability under Superfund.



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SECTION 6 (ECONOMIC REDEVELOPMENT ASSISTANCE PROGRAM)

Although the ABA endorses the concept of voluntary cleanup in S. 773, the provisions authorizing a federal superlien to secure a loan (Section 6) is a major concern to many bankers. Specifically, bankers in states where there is no superlien for cleanup costs also will be harmed by this provision. The superlien provision is a problem in two ways. First, giving the government priority over existing liens on the property is an obvious concern to lenders. Second, the superlien appears to attach "at a time the United States grants a loan under this section...."

Let me discuss both objections: Bankers value and rely upon their liens' priority on property. It appears inequitable that their lien priority can be eroded by a borrower securing a cleanup loan under this bill. In addition, a superlien will undermine the trust that state programs have already built with the banking industry. It changes the rules midstream. The ABA urges the Committee to amend Section 6 to eliminate the super priority of the lien.

The bill should also be amended to provide that the lien created under section 6(d) arise only after compliance with the local state recording statutes. Any lien should only arise



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when a security instrument (a mortgage or trust deed) is appropriately recorded in the real property records of the state where the real property is located. This will enable all subsequent lien holders to have notice of the lien. Mr. Chairman, in my view, the superlien which is contemplated by section 6 is really a "secret lien." It will throw the transfer of real property into great disarray to allow this lien to attach to real property prior to proper recordation.

ENVIRONMENTAL LENDER LIABILITY

The ABA is committed to seeking statutory relief for innocent lenders and trustees who are held responsible for clean up costs when they were not responsible for the contamination. Such legislation is critical in order to ensure that credit and trustee services remain available. Therefore, the ABA urges that any proposals considered during the Superfund reauthorization process include statutory environmental liability protection for lenders and trustees. Once again, the ABA would like to express its gratitude for being given the opportunity to comment on your legislation. The banking industry will continue to work with you throughout the process to ensure that the intent of your proposal is met -- cleanups of over 100,000 sites that do not fall within the Superfund program, but could assist certain areas of the country achieve economic benefits. At the same time, the ABA also hopes to



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work with you to continue to pursue further statutory reforms with respect to lenders and trustees during the Superfund reauthorization process.

As you know, Mr. Chairman, your state of New Jersey recently passed an environmental liability bill protecting financial institutions and their trust departments. The attached article describes the change in banker concern on environmental liability since the enactment of this new law on May 7. Oregon has similar laws protecting banks in both foreclosure and trustee situations. However, it is also clear that lenders still need a federal statutory response to this problem. The ABA hopes that this committee's pursuit of fairness under a national voluntary cleanup program will continue toward the broader concern of the Superfund liability problem facing lenders and trustees.

CONCLUSION

The Oregon Voluntary Cleanup Program is good for Oregon and good for banking in Oregon. Any program designed to clean up more contamination, faster, without taxpayer money, is good for this country and good for banking. With the reservations discussed above, the American Bankers Association supports this bill. I am pleased to have been here on their behalf. I would be happy to answer any questions you may have.



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COMMUNITY Banking

N.J.'s Environmental Shield Law Seen Boosting Real Estate Lending

By PHIL ZAHODIAKIN

New Jersey's small banks will be less reluctant to make industrial real estate loans now that Gov. James J. Florio has signed an environmental shield law.

The law permits banks to foreclose on properties without facing responsibility for a cleanup. Banks were potentially responsible under the state's Spill Compensation and Control Act. State Banking Commissioner Geoffrey M. Connor says banks already are starting to respond to the shield with loans.

Sees Big Role

Small banks are particularly fearful of environmental cleanups because their costs can far exceed the value of a tainted site. Mr. Connor agrees that many were afraid that such costs could wipe them out.

But he sees a significant role for community banks in any lending resurgence.

"One-seventh of the state's land area is industrial and, of the 43 new banks we chartered in the 1980s, many are in [heavily industrialized] Hudson and Essex Counties."

Small banks with trust departments also will

benefit from the shield because they need not fear liability for taking industrial properties in trust, Mr. Connor added.

Gov. Florio, who as a Democratic congressman was a principal author of the federal Superfund law, was hesitant to sign the legislation. But Mr. Connor helped persuade him that the measure will create jobs.

Not everyone is persuaded, however. Although Jack Davis, president and chief executive of \$330 million-asset Union Center National Bank in Union, says he now would be willing to issue mortgages for industrial properties, he wonders "where's the demand?"

'A National Problem'

"We have scores of properties that were once tool and die shops and the like. But so much light and medium industry is in foreign hands now. Who will want those sites?"

"The new law is a step in the right direction," he added, "but I don't know how much power state government has to address a national problem."

The shield law was signed May 7. It will not apply to banks that helped manage a business before foreclosing on its property. □

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**PREPARED STATEMENT
 OF JAMES P. O'BRIEN
 FOR THE HEARING ON S. 773 ENTITLED
 "VOLUNTARY ENVIRONMENTAL CLEANUP AND ECONOMIC
 REDEVELOPMENT ACT OF 1993"
 BEFORE THE SENATE SUBCOMMITTEE ON
 SUPERFUND, RECYCLING, AND SOLID WASTE MANAGEMENT**

**JUNE 17, 1993
 10:00 A.M.**

INTRODUCTION

Good morning Mr. Chairman and members of the Subcommittee. My name is James O'Brien and I am a partner in the Environmental Practice Group of the law firm of Chapman and Cutler, which is based in Chicago, Illinois.

Thank you for the opportunity to testify today about Senate bill 773, the proposed Voluntary Environmental Cleanup and Economic Redevelopment Act of 1993, which I will refer to as "VECERA". The bill would affect the business people whom we counsel every-day about environmental risks: lenders, investors, securities underwriters, trustees, property owners and company managers.

Chapman and Cutler represents many banks and financial institutions in loan transactions. I frequently help these clients evaluate and address environmental risks in their transactions. In 1992 alone, I and other members of the Environmental Practice Group served as special environmental counsel to lenders for loan transactions totaling more than \$5.4 billion.

In addition, I have the pleasure of serving as Chief Author and Editorial Coordinator of *BNA's Environmental Due Diligence Guide*, a two-volume reference work which is updated monthly. The publication helps parties to business transactions conduct environmental due diligence, particularly lenders and their counsel. By "environmental due diligence," I

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mean the process of investigating, evaluating and addressing environmental issues associated with a transaction.

From my perspective, I have seen that environmental issues are important to our lender clients and often are decisive for loan approvals. These sentiments appear to be widespread as well. In a 1991 survey of approximately 1,600 banks, the American Bankers Association ("ABA") reported that more than 60 percent of the responding banks had rejected loan applications or potential borrowers because of environmental concerns. More than 45 percent of the banks had discontinued financing certain types of loans and properties because they feared environmental liabilities.

Given the importance of environmental matters to our clients, I have worked closely with the ABA during the last five years as legal standards and bank practices have changed. I had the pleasure of contributing the chapter on environmental due diligence to the ABA's 1989 book entitled *Managing Environmental Risk: A Practical Guide for Bankers*. I believe I can articulate the views of ABA's member banks, and institutional lenders, in providing my testimony today.

As special environmental counsel to more than 900 different regulated and non-regulated lenders, underwriters and financiers, I can say that lenders will accept a voluntary cleanup when considering whether to take property as collateral. In that respect, VECERA accomplishes its goal: problem properties that complete voluntary cleanups can and will be financeable, despite past environmental blemishes. This bill works for lenders.

In addition, as an Illinois environmental attorney, I have had the opportunity to assist clients with several site remediations in cooperation with the Illinois voluntary cleanup program. I would like to describe several accomplishments of that program and highlight one company's major voluntary cleanup, which saved U.S. jobs and created more than 500 additional high-skill, high-wage jobs.

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THE ENVIRONMENTAL CONCERNS OF LENDERS

Conversations about solvent usage, sludge treatment ponds and laboratory detection limits have moved from the shop floor to the credit committee. The environmental responsibilities of businesses and industries have become the worries of their lenders. Much of our time is now spent to oversee, review and advise lender clients about environmental assessments of the properties and liabilities of their prospective borrowers. These assessments have become standard for most secured -- and many unsecured -- business loan transactions.

This is because the continuing expansion of environmental laws and regulations has created or increased four basic lending risks:

1. Borrower creditworthiness, or the ability to repay a loan, may be impaired by the costs to clean up hazardous waste contamination or correct legal violations;
2. Collateral value or marketability may be reduced because of hazardous waste contamination or legal violations;
3. Lien priority for a mortgage may be jeopardized by costs incurred by a regulatory agency to clean up contamination at the collateral securing a loan; and,
4. Lender liability may attach for hazardous waste contamination at a borrower's properties.

The four basic lending risks are discussed in more detail in the "Prepared Statement of James P. O'Brien for the hearing on H.R. 4494 and Lender, Corporate Fiduciary and Federal Government Liability for Environmental Costs before the House Subcommittee on Transportation and Hazardous Materials," dated August 2, 1990, a copy of which is available upon request.

On the positive side, these concerns often drive the cleanup of contaminated properties or cure of regulatory violations; we have seen many borrowers anticipate lender scrutiny and take remedial action to smooth the closing of loans. On the negative side, financing of otherwise worthy projects may collapse; the potential cleanup costs may exceed the value of

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collateral in depressed areas, the time, effort and expense to quantify environmental risks may not seem justified, or the "stigma" of contamination may simply be too much to overcome.

Obviously, the four basic environmental risks are not insurmountable, because deals are being done. It is not that risks always are eliminated, it is that lenders can underwrite them and become comfortable when they have sufficient information to gauge environmental risks and factor them into credit and collateral analyses. We frequently assist this process by analyzing a borrower's environmental legal liabilities and defenses, based upon information provided by a borrower or consultant. We have seen many loan officers alarmed about contamination of collateral at the outset of financings, but become satisfied that the probable environmental harms were manageable in relation to the resources of borrowers, market values of collateral and exposures to lender liability.

We have observed several tendencies of our lender clients when they encounter the four basic environmental risks, which may affect your consideration of VECERA. Essentially, there are certain conditions which commonly influence lenders' evaluations of the four basic environmental transaction risks.

Lenders often take comfort upon learning that a borrower is cleaning up contaminated property voluntarily; they view voluntary action as a sign of a prospective borrower's prudent environmental management and a way to prevent problems from worsening. Lenders look favorably upon a borrower's willingness to enter into post-closing covenants to take investigative or corrective action. They also take comfort when environmental authorities are aware of hazardous waste contamination or supervising a clean up; lenders want to know the position of the governmental agencies having jurisdiction. In any case, lenders rely upon site assessments, remedial action plans and corrective action reports by environmental consultants to provide a sense of magnitude about potential environmental harms. Finally, the fewer the financial resources of the prospective borrower, the shorter the credit history of the borrower or the lower the market value of the prospective collateral, the more closely a lender will analyze environmental risks and the more likely a lender will reject a loan transaction because of them.

In light of these tendencies, participation by borrowers in voluntary state cleanup and redevelopment programs are likely to make more prospective borrowers and transactions more attractive to lenders, despite environmental imperfections. That is because a void exists; properties are in limbo when environmental conditions warrant corrective action but are not so dangerous as to require attention from governmental authorities. By filling this vacuum, VECERA would encourage favorable lending conditions and discourage unfavorable ones, in terms of the four basic lending risks.

We expect this for four principal reasons: (1) state voluntary cleanup programs provide parties the expertise, and authority, of a regulatory agency, (2) they provide for faster answers, (3) they encourage a cooperative management approach, and (4) redevelopment assistance will advance unfinanceable -- but otherwise worthy -- projects to the point where lenders will be comfortable with environmental risks. Allow me to elaborate on these points.

State Expertise and Authority

State environmental authorities already are important when lenders evaluate transactions which involve contaminated properties; and, that significance is likely to increase, if credit to distressed companies is not to evaporate. Expanded voluntary state environmental cleanup programs will provide for informed opinions about site-specific risks and authoritative determinations of appropriate response actions.

If governmental agencies are satisfied that no further response actions are necessary at affected properties, then lenders will view creditworthiness, collateral value, lien priority and lender liability risks as manageable. Even when no final decision is available, a governmental process generates precedents, for example as to acceptable cleanup methods and levels, which makes for more predictability. The underground storage tank ("UST") program created by the Resource Conservation and Recovery Act has provided a more reliable means to evaluate risks from leaking USTs. Because similar state voluntary cleanup programs serve as such mechanisms, VECERA would increase the likelihood that lenders

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would close transactions involving impaired properties. And they would do so only upon the initiative and request of private parties.

Site-specific judgments by environmental authorities also will help lenders to reconcile conflicting pressures. Virtually all industrial borrowers are environmentally-sensitive to some extent. Meanwhile, lenders are becoming monitored by financial regulators and being scrutinized as possible "deep pockets" for sources of remedial funds anytime they deal with borrowers who have contaminated properties. In our experience, voluntary state cleanup programs make it easier for lenders to balance these concerns.

Financial regulatory oversight

On February 25, 1993, the Federal Deposit Insurance Corporation ("FDIC") issued Guidelines for an Environmental Risk Program ("*Guidelines*") to the banks it supervises. The Guidelines call for regulated institutions to adopt a comprehensive program to address policy formation, training, risk assessment and analysis, monitoring, loan documentation, involvement with borrower operations and foreclosure. A program is to be approved by the board of directors and implemented by a knowledgeable senior officer. The Guidelines state that FDIC examiners will review an institution's environmental risk program as part of general lending examinations and review compliance with the program as part of individual credit analyses.

Although the Guidelines reflect sound banking practices, they may have a chilling effect on lending to enterprises with contaminated properties. Knowing that the FDIC will be reviewing their environmental decisions in hindsight, lenders will become even more reluctant to lend to environmentally-sensitive businesses than, in our experience, they are already. Quantifying environmental risks and liabilities is no easy task; as you know, the regulatory landscape literally is changing day-by-day. Lenders, who are not necessarily familiar with environmental matters on a daily basis, are likely to take even greater comfort from -- and perhaps defer to -- the judgments of environmental regulators. Where such indicators are not available, lenders and the FDIC are less likely consider it to be prudent to

close loans. Therefore, VECERA indirectly would help lenders to satisfy their regulatory responsibilities.

Lender liability concerns

Similarly, governmental decision-making mechanisms reduce risks that lenders who encourage or require environmental cleanups somehow will be deemed responsible for their borrowers' liabilities.

Hazardous substance liability laws are worded, and have been construed by courts, broadly enough to impose liability upon certain lenders who "participate in management" of their borrowers or their borrowers properties. The prime source of this liability is the Comprehensive Environmental Response, Compensation and Liability Act of 1980. Lenders have been very concerned about what types of conduct may impose liability upon them. The case law and regulations have evolved enough to suggest that traditional lending activities will not trigger cleanup liability, but the law still is relatively unsettled. This is especially true as to any significant decision pertaining to environmental management.

Lenders are more likely to lend to borrowers with contaminated properties if borrowers contract to take corrective action. Post-closing covenants to remediate collateral, for instance, provide comfort about the long-term value and marketability of collateral securing a loan. This would prompt borrowers to take beneficial action, but many lenders are reluctant to discuss or negotiate such requirements. They are concerned that post-closing environmental covenants, particularly those specifically addressing contaminated areas, may be interpreted as "participating in management" so as to expose them to the hazardous waste liabilities of borrowers. It may be especially problematic to define an appropriate cleanup level when no governmental agency is overseeing the response.

VECERA would provide lenders comfort about requiring cleanups, which in the long-term may improve creditworthiness, collateral value and lien priority protection, but also may increase lender liability risks. Voluntary state environmental cleanup programs help to minimize these concerns. It is the role of environmental authorities to determine appropriate cleanup actions: they have the expertise and authority to resolve remediation ques-

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tions. By requiring borrowers to participate in voluntary programs, lenders may avoid site-specific technical determinations, and be more comfortable that they are addressing all of their four basic environmental risks appropriately.

Timely Results

Business needs and opportunities arise at a fast pace. Yet, regulatory action is perceived to be slow and unpredictable for sites subject to administrative review. Governmental agencies have inadequate resources to make rapid decisions about all contaminated properties, particularly when resolving complex biological, engineering or technical questions, so they must prioritize them. Getting regulatory approval or at least learning the government's preliminary position may be critical to investment and management decisions of all parties to a contemplated transaction, including lenders. This often is important enough that parties are willing to remediate voluntarily and pay a small premium -- such as an administrative agency's additional incremental overhead -- to obtain timely review by the environmental authorities and the comfort that may provide as to an impaired property.

Expedited remediation procedures improve the prospects of obtaining a loan in another sense. Cleanup projects typically occur in progressive phases from investigation to intensive, limited-duration site corrective activities to long-term operations and maintenance ("Q&M") measures. Because O&M activities, such as groundwater monitoring, usually occur after most the risky, expensive remediation has occurred, they may represent relatively small proportions of total cleanup costs at lower risk. Consequently, the faster borrowers reach the O&M stage, the sooner lenders will view them as presenting tolerable risks.

Cooperative Environmental Management

Facilitating private and state governmental responses for timing or other reasons also promotes a more cooperative and less adversarial relationship between borrowers and regulators. Although, not surprisingly, as an attorney I have seen cases where I believe litigation was unavoidable, contested administrative orders and lawsuits are likely to complicate lenders' evaluations of environmental risks. Because outcomes are more difficult to predict

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when parties may disagree, it is more difficult for lenders to become comfortable. Conversely, voluntary responses generally are viewed as a sign of environmental responsibility. Lenders are less likely to hesitate when prospective borrowers are working voluntarily with the environmental regulators.

Obtaining Financing

For lenders to finance an environmentally-impaired property, two practical tests must be met:

1. Enough information must be available to properly estimate or quantify environmental risks; and,
2. Projected environmental risks must be immaterial in relation to borrower creditworthiness, collateral value or other considerations.

These thresholds may be relatively easy to cross for transactions involving properties on which existing operations of large, established companies are located.

The thresholds may be more difficult to cross for transactions which involve abandoned, inactive properties, new construction or young or small businesses. Interested parties may not be able to afford the site investigation necessary to demonstrate minimal contamination. Even if they can, lenders may not provide financing, because they properly may be more cautious about transactions involving unproven enterprises or entrepreneurs. Thus, there are times when financing is unavailable from the marketplace for good reason.

Although we cannot speak for government officials, if they believe that a redevelopment project otherwise would be expected to bring about a significant improvement in the community or its tax base, then the site characterization and redevelopment assistance contained in VECERA may eventually make financing available from the private sector. Every loan approval must be decided on its own particulars, but based on what we have observed, it is reasonable to expect that a government-assisted site characterization or remediation will improve the prospects of obtaining private financing and on occasion make the crucial difference.

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For example, we have worked on a proposed project to redevelop an old municipal landfill in a formerly remote area which has become a busy commercial area. Lenders to the interested parties initially were resistant because of environmental concerns about landfill liabilities, including some minor leaching of contaminants into groundwater. However, the project is moving forward, in part because extensive environmental investigations were conducted to evaluate risks, the positions of environmental regulators were known and the local municipality is providing assistance because of the economic prospects. The project probably would have foundered because of environmental risks without any of these three components.

THE ILLINOIS VOLUNTARY CLEANUP PROGRAM

Illinois has had a voluntary cleanup program since at least 1986. The current form is called the Illinois Pre-Notice Site Program ("*Pre-Notice Program*"). Owners or operators may voluntarily assess and remediate a contaminated property with the oversight of the Illinois Environmental Protection Agency ("*IEPA*"). Once the approved preventive or corrective action is concluded, then IEPA may release any person from further responsibility for such action. IEPA may enter into a services agreement with the initiating party to recoup the state oversight costs.

Through the Pre-Notice Program, IEPA has entered into oversight services agreements at 288 sites. Remediations have been completed successfully at 39 of those sites and are in progress at another 70. Assessment or investigation is ongoing at 102 sites. The Pre-Notice Program will handle 77 other sites, most of which are former manufactured gas plant sites, as part of a widespread utility plan to conduct investigative and remedial activities.

The Pre-Notice Program is administered in conjunction with IEPA's non-voluntary remedial actions and is comparatively inexpensive. IEPA has ten project managers who devote attention to the Pre-Notice Program. For IEPA, the average yearly cost of a remedial project manager is \$35,000. Participating parties on average have made a \$2,000 prepayment of IEPA oversight costs upon entering the Pre-Notice Program and have paid an

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additional \$5,800 in oversight costs to complete it. Since 1989, IEPA has received \$643,000 for Pre-Notice Program oversight, of which \$418,000 came from prepayment. In short, owners and operators of contaminated property have been able to obtain IEPA oversight and a clean bill of health for an average of \$8,000 per site. That is a relatively modest sum in relation to total remediation expenses.

The Pre-Notice Program has been employed for some prominent projects. In Chicago, the former Santa Fe railroad yard is being redeveloped into commercial and residential uses as remediation work is completed on the southwest side of the Loop, near Chinatown. Similarly, tainted areas at Chicago landmarks such as Navy Pier and the Lincoln Park Gun Club are undergoing remediation for public or community use. In nearby Skokie, the American Telephone & Telegraph Company assessed and remediated its former facilities through the Pre-Notice Program. After IEPA signed off, the Trammell Crow Company redeveloped the property into a shopping center complex.

In each instance, IEPA worked closely with the site owners, prospective purchasers or developers on a remedial action plan and implementation leading to site closure. The Illinois projects brought together voluntary, private remedial action, an important contribution to state-wide environmental protection, and a economic redevelopment. The assurances that environmental conditions had been resolved to the satisfaction of IEPA provided powerful inducements to those who financed the redevelopments.

Let me be more specific about a site on which I worked for a client.

The client is a large company which manufactures a variety of well-known name brand products. I will refer to the client as "Company." Over the last several years, Company has continually expanded its industrial campus in a city in Illinois. Company employs several thousand persons at its campus in highly-skilled, and well-paying, engineering, design and production jobs. As the industrial campus has expanded, Company has acquired buildings and property to increase its operations and employ more people.

Eventually, the industrial campus was not large enough to accommodate efficiently all of the Company operations. There were two problematic choices: Either move all of the operations to a new location, where there was sufficient space for expansion, or acquire available property adjacent to the campus. The first alternative could have prompted moving some of the operations out of the United States altogether. The problem with the second alternative, however, was that the only available property was contaminated from former wood-treating operations. From the 1920s until the 1970s, the adjacent property had been used for treating wood with creosote, which resulted in soil contamination from a variety of hazardous substances. Because of the contamination, more than 34 acres in the middle of this vibrant city had almost no ongoing use. Although there was a responsible property owner, those many acres contained only unused buildings and facilities.

Company was interested in purchasing a portion of the adjacent property for its expansion. Extensive soil testing and sample analysis, however, demonstrated that though the property was contaminated, it did not fall into one of the other Illinois environmental programs. Presumably, as other priority sites were resolved, eventually attention would have turned to this site. Company could not delay its business plan, however, until the site finally worked its way through the cleanup programs.

Although concerned about the complex and broad environmental laws, Company began to explore the possibility of remedial action during facility construction and expansion. Working with IEPA, Company prepared and submitted a remedial action plan ("RAP") which incorporated a cleanup as part of site construction. By performing remedial work during construction, Company projected that the additional cost could economically be absorbed in the construction project. Although more expensive, the project would still be attractive for keeping all of the Company's industrial campus in the city, and even expanding the campus through new facilities.

After meeting with Company representatives and vigorously reviewing the RAP, IEPA timely approved the submitted RAP and established cleanup objectives for the property. Based upon that approval, Company was able to go forward with the property purchase agreement, the expansion and construction of its industrial park campus facilities.

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This commitment to this project meant that all of the several thousand jobs would stay, and the new facilities are expected to result in the creation of approximately 500 new design, engineering and production jobs.

There were several important factors to the success of the this project. First, IEPA had in place a program to provide oversight of the site investigation and remedial action. The contamination problem was significant enough, that a prospective property purchaser probably would not have been willing to rely upon the assurances and opinions of private environmental consultants.

Second, by funding the costs of oversight, Company was assured that its project would receive proper attention. The problems with tight governmental budgets have affected all agencies, including environmental regulatory agencies. Multi-million dollar construction and expansion plans cannot always wait for government resources to free up. Of course, in this instance, the positive and constructive attitude of the Illinois regulators was important to the timely turnaround on Company's RAP.

Third, Company was working with state environmental agency representatives who had a firm grasp of the local issues raised by the contamination. State regulators were already aware of the issues and problems with the property, and had been working towards remediation. Rather than attempting to set national or regional policy for cleanup procedures, as would a federal response, IEPA representatives were able to tailor their concerns to this property with this use in this area.

Finally, Company enjoyed the financial capability to pay the additional costs of remediation as part of facility construction. Many site owners or perspective purchasers may not have the financing necessary to implement an RAP, even if a good state program is in place.

I find that VECERA reflects each of the lessons learned from this success. First, the legislation provides the opportunity for states to establish voluntary cleanup programs by funding approximately six to fifteen project managers. Although each state is different,

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Illinois is a midwestern industrial state with many impacted properties. The ten Pre-Notice Program Illinois project managers have been able to provide oversight at almost 300 voluntary sites. With the proposed level of funding, most states should be able to establish working programs.

Second, the legislation allows the states to require reimbursement of oversight costs. The Illinois experience has been that oversight costs are relatively minor compared to the value of the property and the project. Moreover, as the number of voluntary remedial projects expands, additional reimbursement refunds will be available to hire more project managers. Voluntary sites will continue to receive the attention deserved - and demanded - in today's business climate.

Third, the legislation provides that the state will pass on and provide oversight for all cleanups undertaken through the voluntary program. State regulators are better positioned to administer a program directed at contaminated, but not dangerous properties. Prospective purchasers and developers will not be concerned that their Site will become a test case or a vehicle for national policy.

Finally, the legislation provides a way to obtain funds that make this all possible. Good programs and good ideas are not enough for good potential purchasers that cannot obtain remediation funding from regulated and non-regulated lenders. Unlike my client, most property developers could not generate internally the funds necessary to construct productive and useful facilities. Instead, they must rely on lenders to risk the funds necessary for property development. As noted above, lenders will not and cannot undertake those risks without adequate assurances.

THE CITY OF CHICAGO PROBLEM PROPERTIES INITIATIVE

In 1991, Mayor Richard Daley asked the Economic Development Commission of the City of Chicago ("EDC") to establish an Industrial Sites Task Force ("*Task Force*") on which I had the pleasure to serve. Like many cities with an industrial history, Chicago has underutilized or abandoned properties affected by past industrial use. The potential

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environmental problems have created an obstacle to redevelopment of those properties. The Task Force's assignment was to get those properties back into service as well-utilized and productive properties.

During its discussions, the Task Force identified three general characteristics of problem properties. First, each property has or could have an environmental problem that confronts a prospective purchaser. Second, the potential cleanup costs could be material compared to the value of the property. Finally, financing property improvements is difficult because lenders are reluctant to take contaminated property as collateral.

Using each of these three themes, the Task Force prepared hypotheticals representative of problem properties. Each Task Force member developed strategies to put properties back into service.

Attached to this statement is our discussion of the problem Chicago properties and potential resolutions. In each instance, a voluntary cleanup program is crucial to further development. Prospective purchasers need the certainty of state oversight and the capability of quantifying costs. Only through a voluntary cleanup program, that is not part of the regular enforcement action of the regulatory agency, can problem properties be put back into service.

SPECIFIC COMMENTS ABOUT VECERA

Finally, I would like to comment on specific provisions in the proposed legislation.

Property Characteristics

First, VECERA is aimed at properties with two characteristics: Properties that are important to community economic development and the local tax base, and properties with contamination that is not so severe that it presents an insurmountable obstacle to redevelopment. VECERA loan funds should be targeted to redevelopment that stimulates economic development, and properties that can be cleaned up at the voluntary and private level. Although there are good reasons to clean up contaminated property generally, there are so

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many "blemished" properties that could be put back into service with limited time and money, that the resources provided by VECERA should be directed to those properties.

Although only as manner of anecdote, most environmental consultants and lawyers can pick out properties that will be difficult to clean up. The contamination may be widespread or the nature of the contaminants may make remediation difficult. In any event, even though deserving, those properties must wait for a greater commitment of resources, or a dramatic increase in surrounding property values. As drafted, VECERA gets the most "bang for the buck." Of course, nothing in VECERA prohibits the state voluntary cleanup program from handling seriously affected properties.

Site Cleanup Objectives

Second, VECERA provides for state oversight for a prospective purchaser-contemplated cleanup. Many prospective purchasers are not willing to close a transaction until after the state's cleanup requirements are established. Typically, cleanup objectives for contaminants are established on a site-by-site basis. As long as the prospective purchaser has established cleanup objectives, the cleanup loan transaction should be able to go forward, and in some instances, even the property purchase.

Sometimes, prospective purchasers and lenders are frustrated by the absence of national cleanup goals and standards. They argue that fixed cleanup objectives would make it easier to quantify cleanup costs and underwrite the risk of environmental contamination. The problem, however, is not a lack of standards, but rather a lack of state agency resources and a program to provide cleanup objectives. Rather than establish national cleanup standards, VECERA provides the resources to state agencies to establish cleanup objectives at proposed voluntary cleanup sites.

Most prospective purchasers and their counsel would be very concerned about national cleanup standards for property transfer transactions. Industrial sites present less risk of exposure than other property uses. Some communities are widely affected by contamination that could never be addressed at a specific site. National cleanup standards impair the flexibility of state regulators to tailor corrective action or remediation to the proposed site

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and its expected use. As long as the state agency establishes cleanup objectives before the work starts, then cleanup costs can be estimated.

State Sign-off

Although VECERA does not require the state agency to provide a "sign-off" or rule on closure of the site, it is likely that state agencies will seek to provide that assurance to prospective purchasers and lenders. Since future pre-purchase environmental assessments will uncover the historical contamination problem, it will be useful to have agency closure on the cleanup performed. From the perspective of a prospective purchaser, the risk is that the environmental agency later changes the cleanup objectives for particular contaminants. Assuming the state agency has agreed that the site was closed in accordance with cleanup objectives protective of human health, then later adjustment of cleanup standards should not affect the closed site. In the event the site is later contaminated by new contaminants, or new contamination is found, it is not practical to expect that the state agency will be unable to require cleanup of a problem unrelated to the closed voluntary cleanup.

Public Participation

Public participation is a key element of every environmental program, law or regulation. The level, mechanism and due process rights provided to the general public differs, however, depending upon the particular permit or approval. For example, in the underground storage tank ("UST") program, the public may provide comments upon site investigations and corrective action proposals at leaking UST sites. The level of participation is within the discretion of the agency, however. In the event there is sufficient public interest, the agency may schedule a public hearing to take comments. On the other hand, in the event the agency determines that no public hearing is necessary, the approval may be granted.

Since voluntary cleanups should be accomplished quickly and economically, lengthy public comment periods and proceedings are impractical. On the other hand, citizens in each state have come to expect differing rights and ways in which to comment on environmental issues. As drafted, VECERA allows the state regulatory agency the discretion to

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establish appropriate public participation opportunities. Rather than establish a national rule, VECERA appropriately leaves the decision to the state agency.

Federal Superlien

One aspect of VECERA causes concern: the federal superlien provision in section 7(d). There the bill provides that a lien against contaminated property arises for remediation loans granted by the United States. Unlike other lenders' liens which take priority as of the date of recordation, the federal lien is a "superlien," which primes prior perfected security interests. The result is that if the property is eventually sold, the federal lien is paid off first.

Typically, new lenders negotiate with current lenders about lien priority. Often current lenders are willing to adjust rights because the new lenders are providing additional funds to a common borrower. Sometimes, current lenders refuse to subordinate lien rights, however, because the new obligations may overextend the borrower and jeopardize the current lenders' position. Indeed, some loans are made "non-recourse," which means that the borrower is not personally obligated to pay off the loan, and the lender has only the property as security.

Depending upon the circumstances, it may be better to sell the contaminated property, rather than further encumber it with a first priority remediation loan. In other instances, a remediation loan, not available from any other lender, may be just the tool to substantially improve property value - to the benefit of the current lenders. The point is that a remediation loan should be treated just like any other secured financing where priority is negotiated with current lenders. The current lenders have already committed to maximize the property value by providing financing; their interest in the property should be protected.

CONCLUSION

In conclusion, VECERA is a sensible and workable solution to the problem of environmentally blemished properties that cannot be financed. State voluntary cleanup programs help minimize the environmental risks to lenders, and for regulated institutions,

Law Offices of

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cleanup programs will satisfy regulatory guidelines. From the lenders' perspective VECERA works.

Similarly, as an environmental lawyer who has enjoyed the success of the Illinois Pre-Notice Site Program, I can say that state voluntary cleanup programs work. Otherwise reluctant prospective property purchasers can go forward with new development because of the state's approval of cleanup plans. The Illinois program has saved and created new jobs.

I support the passage of VECERA.

[NOTE: An attachment to this statement has been retained in committee files.]

SIERRA CLUB



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Testimony of A. Blakeman Early
On Behalf of the Sierra Club

Before the

Subcommittee on Superfund
of the
Senate Committee on Environment
and Public Works

June 17, 1993

Mr. Chairman and members of the Subcommittee, it is a pleasure for me to come before you today to testify in support of the Voluntary Environmental Cleanup and Economic Redevelopment Act of 1993, S. 773.

While the Subcommittee will no doubt spend a long time deliberating on how best to improve the Superfund program, S. 773 represents a discrete effort to address one of the unintended effects of the Superfund program, the reluctance of those who own or buy properties containing low levels of contamination to use or develop these properties for economically productive purposes.

Let me state at the outset of my testimony that the Sierra Club strongly believes that a very valuable but unmeasurable effect of the Superfund program has been the stimulation of the cleanup of contamination on sites by site owners. These owners engage in these cleanups to avoid the possibility that such site might ultimately be caught up in the Superfund program. We are hopeful

"When we try to pick out anything by itself, we find it hitched to everything else in the universe." *John Muir*
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that these cleanups are being conducted in an effective and thorough fashion to assure public health and the environment is being protected and that the cleanup itself does not enhance such threats rather than diminish them. Unfortunately, we have no way of knowing if this is the case.

However, our discussions with state and local environmental officials, industry personnel, and real estate developers provides us with reason to believe another effect of Superfund is to influence other owners of contaminated sites to avoid cleaning them up and avoid using them for any purpose for fear that they might somehow be caught up in either Superfund or RCRA and incur cleanup expense or liability well beyond the value of the property upon cleanup completion. On the one hand we at the Sierra Club believe in some cases, such reluctance is good. We do not want to encourage cleanups of highly contaminated sites without adequate state, local, or Federal oversight to assure public health and the environment will be protected. On the other hand, we are aware that the avoidance of governmental entanglements is extending to sites which have low levels of contamination that pose no realistic threat to public health and the environment. The unhappy result is that properties which could be used or developed are being left unused due to an inability of its owners, lenders, purchasers, or others to distinguish between serious and minor contamination. As a result, areas located primarily in cities which have been the home of industrial activity for decades are faced with an extra hurdle in promoting redevelopment of some sites so that they can be

the locus of productive economic activity that can contribute to the resurgence of the local economy. It is precisely these types of sites that S. 773 seeks to address and Sierra Club supports this effort. This legislation will provide a discrete, limited grant program aimed at providing state and local governments with the resources they need to identify the low level contamination sites that have development potential and then provide the necessary technical assistance and oversight to enable such sites to be cleaned up if necessary and put back to productive use. Let's get these "minor contamination" sites out of the way quickly and concentrate our energies on how to cleanup the sites of real concern.

It is important that this legislation not be too ambitious if it is to move through Congress in a timely fashion and not be caught up in the Superfund debate. We believe that a broader, more ambitious voluntary cleanup program would be slowed by the inevitable effect that it would have upon the Superfund reauthorization debate. The Sierra Club will oppose a voluntary cleanup program which we believe could be used to encourage "band aid" cleanups designed to reduce hazard levels sufficiently to escape Superfund, but which do not assure adequate protection of public health and the environment, or which create increased risk to nearby communities during the cleanup process. For this reason, I recommend that this bill not be amended in ways that modify the following key elements which it presently contains.

First, S. 773 is limited - both in terms of the grants moneys available and the low level contamination present at the sites to be addressed.

Second, it requires that adequate public participation in response action selection. In our view, public participation is the best way to assure the program is implemented as intended without extensive federal oversight. Later in my testimony I will provide suggestions regarding how the bill could be amended to more effectively assure adequate public participation is a part of each voluntary cleanup program.

Third, S. 773 requires that states and localities be able to assure cleanup if the initial owner or purchaser reneges on their cleanup obligation or takes some action to actually increase potential threats to health or the environment. This last element is important because it reduces the likelihood that a state or locality will use this program to promote cleanup of sites which pose real potential threats to health or the environment. If states and localities are unwilling to take on this obligation, they should not be encouraged to establish such a program.

Let me turn to some modest improvements to S. 773 which I believe would assure the bill's intent, as I have described it, is effectively carried out.

The Sierra Club is very concerned that sites posing real threats to health and the environment are not addressed under this bill. S. 773 by excluding sites that are subject to Superfund and RCRA has largely done this. However, there remains some areas of

ambiguity which we believe should be eliminated. First, I would recommend that the bill explicitly bar the cleanup of landfills and waste impoundments from eligibility under this program. While some may argue the bill already does this, the addition of specific language will eliminate any potential wrangling about this issue either during the process of enactment or during implementation. According to the Office of Technology Assessment, the currently available, admittedly poor, data indicate over 11 billion tons of Subtitle D solid waste is generated annually. Most of this waste is disposed of in landfills and impoundments. We do not have good information on how dangerous these wastes are. However, given the broad range of toxic constituents known to be contained in these wastes and the high volumes involved, the potential risks to public health and the environment from cleaning up many of these sites could be substantial. In our view, the nature and complexity of landfill and impoundment cleanup is well beyond the scope of what we believe this bill should cover. While it is conceivable that there are landfills or impoundments that contain totally innocuous wastes that could be cleaned up under the program established by this bill, it is worth sacrificing those few sites for the sake of avoiding controversy and conflict. Quite frankly, if these sites or so innocuous, they will be cleaned up whether they are excluded from this program or not.

A related waste category should also be specifically addressed. We believe sites containing petroleum wastes or contamination from petroleum products should be explicitly excluded

from this program. As members of the Subcommittee know full well, the Superfund program contains a very controversial exclusion of petroleum wastes from the program. Therefore, S.773 by excluding sites covered by Superfund does not clearly exclude petroleum waste sites from eligibility for the voluntary cleanup program. We believe these wastes are, by their nature, of sufficient potential hazard that rigorous standards of cleanup should apply. Our concern is that in some cases such standards may not currently exist. We can not support a program that has the potential of promoting the cleanup of potentially dangerous wastes without adequate cleanup standards.

As I mentioned previously, we strongly support adequate public participation in the selection of a response action. The problem is the experience of Sierra Club members across the nation is that state and local officials often have a very limited view of what constitutes "adequate" public participation. Too often simply posting a flyer in the local county municipal building or court house is considered adequate notice. Even when notice of an impending action is published, the inability to obtain detailed information in a timely fashion often frustrates meaningful public participation. We believe these issues can not be ignored in this legislation. The choice is either to define "adequacy" in the bill, require EPA to issue regulations, or require public participation that is "equivalent" to an existing program. We would like to work with members of the Subcommittee to define "adequate" public participation in a way that does not overly burden the bill and the

program it creates but does assure affected members of the public can get meaningfully involved when they so choose.

Finally, we support the provision in subsection 4(b)(4) of the bill which authorizes the Administrator to terminate a grant made to a state and require full or partial repayment in cases where the cleanup program no longer meets the minimum elements of section 4(a). We would recommend that this sanction be augmented by providing a petition process whereby any person could petition EPA to terminate the grant program. EPA should be required to respond to the petition within a reasonable period of time. The availability of such a process would more effectively discourage the abuse of the voluntary cleanup program for unauthorized purposes.

In conclusion, we urge the Subcommittee to expeditiously consider S. 773. We believe with the modest improvements suggested in my testimony that this bill will stimulate the cleanup and redevelopment of properties where such activity is being impeded by unnecessary concern about low levels of toxics contamination.

STATEMENT
on
VOLUNTARY ENVIRONMENTAL CLEANUP AND
ECONOMIC REDEVELOPMENT ACT OF 1993
S. 773
to the
SUBCOMMITTEE ON SUPERFUND, RECYCLING AND SOLID WASTE
MANAGEMENT
of the
SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
for the
U.S. CHAMBER OF COMMERCE
by
Dr. Harvey Alter¹
June 17, 1993

Summary

The Chamber appreciates this opportunity to share its views on the Voluntary Environmental Cleanup and Economic Redevelopment Act of 1993. We commend the authors and sponsors for encouraging voluntary clean-ups of environmentally contaminated sites and the return of real property to the economic mainstream. Filling the bill's goals will assist local economic development all over the country.

I have the privilege of serving as a member of a dialogue group organized by the Environmental Protection Agency (EPA) on "hazardous waste identification," whose scope includes seeking new regulatory constructs for clean-ups. Through this experience, working with representatives from EPA and state governments, environmental groups, and diverse industry sectors, I see the many facets of the value of simplified processes for state supervised voluntary clean-ups.

This statement addresses what we believe are some major strengths of S.773 and raises some issues and areas for improvement and expansion of the approach.

At the same time, all of us must be reminded that even though S.773 addresses only "lightly contaminated" sites, it must not be viewed as — or become a substitute for — comprehensive reauthorization of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). We take note of, and some encouragement in Senator Lautenberg's

¹Manager, Resources Policy Department, U.S. Chamber of Commerce.

remarks in the *Congressional Record*² of his commitment "to considering whether some of the innovative ideas represented [in S.773] ... can be integrated into the Superfund process." However, many of our members, both large and small businesses, are frustrated by the presently arcane requirements of Superfund, particularly the delays and high costs of clean up. We look to this Subcommittee moving toward comprehensive reauthorization of this important law soon.

This is not to ignore EPA's past³ or recent efforts including (at the beginning of this month) to make administrative improvements in the Superfund program. Nor, in this context, can we ignore the improvements needed in the Corrective Action Program under the Resource Conservation and Recovery Act (RCRA).⁴ Many of the problems identified in both programs cry for legislative and administrative attention.

Introduction

The site-specific, risk-based approach in S.773 is the most likely to lead to significant increases in voluntary clean-ups of contaminated media. The results can be cost-effective, expedited environmental remediation and opportunities to use innovative treatment technologies at little or no cost to governments. The approach will return now worthless property to commercial use.

Public participation in development of a remedial plan is appropriately encouraged by this bill. Public participation assures that the real risks posed are addressed in cost-effective ways and builds confidence that remediation proceeds in appropriate directions.

S.773 is an important start down the long road of simplifying clean up. At the same time, we believe S.773 could also address the real impediments to voluntary clean-up — the automatic triggering of RCRA permitting, land disposal restrictions (LDRs), and minimum technology requirements (MTRs). This statement elaborates these and some other points.

²April 3, 1993, page S 4501.

³U.S. Environmental Protection Agency. 1989. A Management Review of the Superfund Program. EPA/504/8-89/007. Office of Emergency Response. Washington, D.C. See also: *ibid.*, 1992. EPA Superfund: Report of the EPA Superfund Revitalization Public Meeting Held on June 24, 1992. Publication 9202.1-07. Washington, D.C.

⁴Environmental Protection Agency. 1990. The Nation's Hazardous Management Program at a Crossroads. The RCRA Implementation Study. EPA/530-SW-90-069. Office of Solid Waste & Emergency Response. Washington, D.C.

Lightly Contaminated Sites

Sec. 3(2)(A)(ii) limits sites to those at which the contamination “is limited in scope and can be comprehensively characterized and readily analyzed.” This phrase is vague; it will be difficult to demonstrate that a site is eligible. And, some very important sites are explicitly excluded from the definition of affected sites.

The bill addresses “lightly contaminated” or “minimally contaminated” sites. These terms are not defined, which will be confusing. At the same time, we doubt it possible to adequately define the terms. Therefore, we suggest ways of circumventing the vagueness and expanding the utility of S. 773, but without stepping on the toes of the exclusions in Sec. 3 (2)(B).

The purposes of the bill may be better served if there were no exclusions — but that S.773 applied only to sites cleaned-up under state supervised authorized programs. Thus, a state could facilitate voluntary cleanups if the sites were included in an authorization under RCRA corrective action or the state had programs under their own solid waste or Superfund law. Federal CERCLA sites or any facility included, or to be included, under the National Priorities List, etc. would automatically not be included because there is no federal delegation. A state may elect not to combine the program in S.773 with any of their own programs.

This change would greatly simplify clean-ups and avoid definitional problems.

Finality of Clean-ups

Under the present wording of S.773 there is an open question if the federal government could require that a site be re-cleaned after the state supervised voluntary cleanup. Certainly this must be avoided. (It could be if the new voluntary clean-up program applied to sites under federally authorized RCRA corrective action programs, but there are few of these.)

S.773 should be amended so that any site, not subject to CERCLA or RCRA Corrective Action under Subtitle C, cleaned to a State’s satisfaction, shall be deemed once and forever cleaned, *barring significant new findings*. If this is accomplished, volunteers will have confidence that they won’t be required to both pay now and pay later. In short, liability relief is the *quid pro quo* for the voluntary clean-up.

Regulatory Obstacles

S.773 takes a conservative path by maintaining a regulatory *status quo* by requiring compliance with all federal and state requirements — regardless of their appropriateness to the specific remediation issues at hand. Clearly, certain RCRA regulatory requirements that were developed for process wastes are inappropriate for contaminated media. These provisions include RCRA permitting, LDRs, and MTRs. These obstacles are discussed in papers that EPA prepared for its Hazardous Waste Identification Rule dialogue group and I commend them to your attention.⁵

A constructive way around the problem of these regulatory obstacles would be to legislatively exclude sites from RCRA Subtitle C jurisdiction if, under a state supervised voluntary program, the state can certify that the clean-up meets certain standards. Remediation would proceed in accord with a remediation action plan (RAP) approved by the state agency. Subtitle C jurisdiction would not apply if the concentrations of hazardous constituents within the materials met some national levels set at concentrations appropriate for the site, in conjunction with the site-specific risk assessment.

This sort of program could cover all contaminated media and debris but not containerized waste that clearly can be classified by hazardous waste code or any of the waste that the state determines should be subjected to full Subtitle C control under the terms of the RAP. The RAP would set management standards, which could be the same as in federal or other state regulatory or remedial programs.

It would be important that the states have to demonstrate to EPA (*e.g.*, through a self-certification process) that they have the authorities and resources to carry out the programs. Methods can be established to protect against abuse.

The program can be implemented through S.773 without amending RCRA. We would be pleased to meet with Subcommittee and staff and elaborate why and how. The important point is that a program can easily be established to avoid unintended and obstructive consequences of the current legislative and regulatory regimes, without compromising environmental protection and public health. If not, the program envisioned in S.773 may have so many obstacles that it won't be used.

⁵These requirements are avoided under the Superfund program. However, this point is moot because S. 773 does not address federal Superfund clean-ups.

An advantage of this approach is that it will enable the voluntary state supervised program to later address corrective action sites. In the future, there will be very many such sites simply because treatment, storage, or disposal of hazardous waste may have taken place at some point in the past. This does not mean that all the sites are dangerous, just that the country has substantially raised its standard of acceptance.

Sites Containing PCB's

Subsection 3(2)(B)(vi) excludes sites containing PCBs "subject to response" under Sec. 6(e) of the Toxics Substances Control Act (TSCA). We are confused. Our reading of Sec. 6(e) does not show that it addresses responses to PCB contamination. Perhaps more important, there is no technical or health-based reason to exclude PCB sites. PCB clean-up techniques and standards can be incorporated into the voluntary clean-ups just as well as any other contamination falling under the constraints outlined above.

Sites from DoD or DoE Activities

Sec. 3(2)(B)(viii) excludes "any facility controlled by, or to be remediated by . . . the Federal government . . ." We suggest this be deleted. The voluntary clean-up program may provide a mechanism for expediting remediation at Department of Defense (DoD) or Department of Energy (DoE) sites. The site may be under the control of the Executive Branch, but a contractor may be responsible and anxious to engage in a voluntary clean-up.

There should be no apprehension that a badly contaminated site might be included, given the suggested constraints outlined above.

Administration of the Act

It was suggested above that this act apply to any state or federally authorized clean-up program. The state should have sole jurisdiction and responsibility for implementing and enforcing the requirements of the act. Doing this will remove an unnecessary layer of federal bureaucracy and will reduce federal costs.

At the same time, we suggest a federal authority (such as vested in the EPA Administrator) to stop voluntary programs on a finding that the state is not properly administering and enforcing any federal or state requirements.

Funding State Supervised Programs

The subcommittee may wish to make it clear that nothing in the act shall prohibit a state from requiring a fee for supervision. However, the fee should be based on reasonable reimbursement of state incurred expenses and not become a tax.

Loan Program

Sec. 6 provides a loan program to be used to clean up affected sites to be administered by EPA. Presumably, many of these loans will be granted to small businesses who otherwise do not have the capital to return their property to economic use. Such people are likely to be unfamiliar with EPA and the new methods of applying to the agency.

Further, Sec. 6(2) makes EPA a banker and requires them to pass on the credit worthiness of an applicant. We suggest there is a more efficient way of doing this by having the loan program administered by the Small Business Administration (SBA).

Many small businesses are familiar with the workings of SBA, which has a working relationship with banks. Thus, there is an existing infrastructure for this loan program.

The SBA may judge the environmental "worthiness" of the project simply by having the loan application accompanied by a state approved remediation plan for the site, accompanied by the site-specific risk assessment. An arrangement of this sort will streamline application and administration procedures and hence clean-ups.

Clean-up Standards

The Subcommittee is familiar with the controversy over choice of clean-up standards or how clean is clean. The program envisioned by S.773 re-opens the debate. We suggest S.773 is an opportunity to solve the problem, even if just for the state supervised voluntary program at this time.

Clean-up must be to the intended use of the remediated site. For example, if the site is paved over, there is obviously no point in cleaning it to child soil ingestion standards. Similarly, if the site is to be used for an industrial facility, especially if fenced, there is no need to clean to a similarly high standard.

The Subcommittee may wish to consider means of assuring that a site cleaned today for industrial use is not cleared for residential use years later. One possible means of so assuring would be to require a covenant on the land for the intended use that can be lifted only if there is an environmental assessment of the suitability of the site for that other use. The covenant would protect the site in perpetuity. (There may be additional ways of achieving assurance.) This sort of program permits a wider range of clean up standards without endangering public health or the environment and we believe it warrants discussion.

If there are no limits on the extent of clean-up, we fear the program can be abused and, in the name of environmental safety, requirements will be imposed to clean a site to below or close to background.

Use of Risk Assessment

Although we favor site-specific risk assessment in this program, we recognize that there are some weaknesses in such a program. Risk assessment is a valuable tool for improving insight and providing an analytical framework for comparative analyses. However, such assessments are too often not comparable because of the various ways they are conducted.

There are several ways this can be remedied. Full discussion is beyond the scope of this statement. However, we will be pleased to share detailed ideas. In the meantime, we urge that at least at the minimum, S.773 prohibit the use of upper bound risk assessments. Results at the median are much more applicable, especially for the types of sites likely to be included in this program.

Analytical Requirements

Soil samples at candidate sites will have to be analyzed so as to assess a site, plan its remediation, and know when it is clean. States and land owners must have reliable analyses for these purposes. If the site were being managed under CERCLA, there is a requirement that a CLP (Contract Laboratory Procedure) analytical laboratory be used.

When the programs are not under CERCLA, there is a natural tendency to still require or use a CLP facility because it is the only indication people have that the laboratory has met some sort of federal inspection and standards.⁶ There is no federal laboratory certification.

⁶Several states have lab certification programs but not for soils. Further, there is little reciprocity among state programs.

Using CLP facilities for analytical assurance for the program in S.773 is one answer, however an expensive one. Because of the CLP requirements, analytical costs are much higher with them than without. Still, high quality analytical services can be provided without CLP procedures, often by the same organization.

To offer an example, one of our members received quotes for the same battery of analytical services, from the same laboratory, with and without CLP procedures. The quotes were \$70,000 and \$18,000 respectively.

A full discussion of the background and importance of federal certification is beyond the scope of this statement. However, we would be pleased to meet with the Subcommittee and outline a simple solution to reduce costs and streamline the programs.

Conclusions

S.773 is a valuable contribution to the national effort to clean contaminated real estate. The country proudly raised the standards of environmental acceptability of previously used industrial sites, which has caused a need for supervised clean up programs. Permitting and encouraging voluntary programs with state oversight will, no doubt, clean more sites than any other approach. At the same time, the programs must not be smothered in bureaucratic layers or drowned in inappropriate RCRA requirements. S.773 has the clear potential to achieve this.

AMERICAN
BANKERS
ASSOCIATION

1120 Connecticut Avenue, N.W.
Washington, D.C.
20036



EXECUTIVE DIRECTOR
GOVERNMENT RELATIONS
Edward L. Yingling
202/663-5122

April 19, 1993

The Honorable Frank R. Lautenberg
Chairman
Subcommittee on Superfund, Recycling, and Solid Waste Management
United States Senate
458 Senate Dirksen Office Building
Washington, DC 20510-6175

Dear Mr. Chairman:

The American Bankers Association is writing to commend you for introducing S. 773, the "Voluntary Cleanup and Economic Redevelopment Act of 1993." The American Bankers Association (ABA) is the national trade and professional association for America's commercial banks, from the smallest to the largest. ABA members represent about 90 percent of the industry's total assets. Approximately 94 percent of ABA members are community banks with assets of less than \$500 million.

As an industry deeply concerned about liability for lenders under state and federal environmental laws, but supportive of proposals that could improve economic development, we believe that S. 773 is a great first step toward easing our concerns. Your bill is based on successful state programs such as those that exist in Oregon, Illinois, and Massachusetts, where an owner of a contaminated site can volunteer to pay for the cost of remediation and state oversight. In return, after remediation is completed, the state will issue a letter which will indicate to prospective buyers and lenders that "the property has been cleaned up to the government's satisfaction and that other parties need not fear for potential cleanup liability."

Bankers in jurisdictions where voluntary cleanup laws now exist are very aware of these successful programs and have urged enactment of a similar proposal at the federal level. As you know, Mr. Chairman, the banking industry, and specifically the American Bankers Association, have long been advocates for fairness to lenders under the environmental laws. S. 773 could help address our liability concerns by setting the stage for development of previously neglected contaminated sites. This will be good for the environment and good for the local economy: a win-win situation.

AMERICAN
BANKERS
ASSOCIATIONCONTINUING OUR LETTER OF
April 19, 1993

SHEET NO. 2

The ABA remains committed to seeking statutory relief for innocent lenders and trustees who are held responsible for clean up costs although they were not responsible for the contamination. We believe such legislation is critical in order to ensure that credit and trustee services are available to many of our customers. Once again, we would like to express our gratitude for being given the opportunity to comment on your legislation. The banking industry will continue to work with you throughout the process to ensure that the intent of your proposal is met -- cleanups of over 100,000 sites that do not fall within the Superfund program, but could assist certain areas of the country achieve economic benefits. At the same time, the ABA hopes to work with you to continue to pursue further reforms with respect to lenders and trustees during the Superfund reauthorization process.

Sincerely,


Edward L. Yingling

Association of State and Territorial

ASTSWMO

Solid Waste Management Officials

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Statement for the Record
of the Hearing of the Senate Superfund, Recycling
and Solid Waste Management Subcommittee
on Environmental Cleanup and
Economic Redevelopment

June 17, 1993

by The Association of State and Territorial
Solid Waste Management Officials
(ASTSWMO)



STATEMENT FOR THE RECORD

The purpose of this statement for the record is to reflect the views of the Association of State and Territorial Solid Waste Management Officials (ASTSWMO) regarding legislation recently proposed by Senator Lautenberg of New Jersey, the Voluntary Environmental Cleanup and Economic Redevelopment Act of 1993 (S. 773). This bill is to be considered at a June 17, 1993 hearing of the Senate Superfund, Recycling and Solid Waste Management Subcommittee of the Senate Environment and Public Works Committee, regarding Environmental Cleanup and Economic Redevelopment. We respectfully request that this statement for the record be included as a part of the record of that hearing.

The Association of State and Territorial Solid Waste Management Officials, referred to hereafter by the acronym "ASTSWMO", is a non-profit association representing the collective interests of waste program directors of the nation's States and Territories. Besides the State cleanup and remedial program managers, ASTSWMO's membership also includes the State regulatory program managers for solid waste, hazardous waste, underground storage tanks, and minimization and recycling programs. Our membership is exclusively drawn from State employees who deal daily with the many management and resource implications of the State waste management programs they direct. Working closely with the U.S. Environmental Protection Agency (U.S. EPA), they share the objectives of the Congress and the public in providing for safe, effective and timely cleanup of the many hazardous waste sites

throughout the nation.

NATIONAL NEEDS FOR WASTE SITE CLEANUP:

Current estimates indicate that there are tens of thousands of suspected contaminated sites in this country with approximately 1,256 of those being listed on the National Priorities List (NPL) and addressed by the U.S. EPA. State Agencies are responsible for remediating the majority of the remaining sites. We believe too little attention has been given by the federal government to this vast number of non-NPL contaminated sites which, under current law, will never receive Superfund resources, and must be cleaned up by States, localities, and responsible parties, and ASTSWMO appreciates Senator Lautenberg's recognition of this void by his introduction of S. 773. S. 773 will encourage the development of State voluntary cleanup programs and enable financial assistance to be provided for the investigation and cleanup of those contaminated sites which must be cleaned up by States.

STATE CLEANUP PROGRAMS:

Many States already have developed voluntary cleanup programs whereby private parties are able to perform site cleanups with State oversight. The private parties are often required to pay for all State costs associated with the cleanup and, if conducted adequately, may receive State certification that the cleanup has been performed to the State's satisfaction. However, these State programs have been built entirely by State initiative and the ASTSWMO Board of Directors fully supports legislation which would clarify the primary role State Agencies have in implementing

voluntary cleanup programs for non-NPL sites (i.e. State sites).

Due to the vast number of sites States must address, a primary benefit of State run voluntary cleanup programs is the assurance of timely remediation of non-NPL State sites, particularly where abandoned land can be placed back into productive use. The establishment of roles and responsibilities for Federal and State Agencies at non-NPL sites which recognizes the primary State role will promote the most effective use of government resources. S. 773 appropriately recognizes the importance of providing "seed" money to assist States in establishing voluntary cleanup programs and furthering the development and enhancement of State capabilities.

SUGGESTED REFINEMENTS:

ASTSWMO respectfully offers the following comments for your consideration during this hearing, and during subsequent refinements of S. 773:

1. SCOPE. The scope of sites eligible for voluntary cleanups should be as broad as possible, limited only where the Federal government is prepared to expend public funds, has issued a permit for the cleanup, or has initiated enforcement action against a responsible party (e.g., NPL sites or RCRA Corrective Action sites). S. 773 is written to indicate that any site subject to a "planned or an ongoing response action under the Comprehensive Environmental Response, Compensation and Liability Act of 1980" be exempted from this program. ASTSWMO requests further delineation of the word "planned" and respectfully recommends a definition of eligible sites to simply include all non-NPL sites.

2. ROLES. Assuming this program applies only to State sites, ASTSWMO strongly urges the addition of language to clearly delineate the respective roles of the Federal and State governments. ASTSWMO believes the intent of S. 773 is to establish a program whereby U.S. EPA would simply administer grants to States who apply and self-certify against the specified criteria to be eligible for federal funding. Preliminary discussions with U.S. EPA staff indicate that this is not their interpretation of the bill, particularly in regards to the phrase: "The Administrator shall establish a program to provide a grant to any State...." The beauty of this bill is that it allows for the development of a streamlined, unencumbered program which would expedite the remediation of contaminated sites across the country. It would be a shame to see the development of yet another overly-structured environmental program along the lines of the Federal Superfund program or the RCRA Corrective Action program where the authorization process is complex and inflexible. The sites addressed by S. 773 are traditionally State sites where the work is being performed by State personnel. Developing a program which enables the U.S. EPA to set arduous requirements in order for a State to develop and implement a voluntary cleanup program or legislation, may supplant the good work of existing State Voluntary Cleanup programs and prove counterproductive.

3. DEFINITION. The requirements for what constitutes a State voluntary cleanup program may also need to be reviewed carefully to prevent certain State programs from being excluded from the

legislation due to their utilization of innovative processes. For example, Massachusetts has currently drafted regulations which would allow for the establishment of a Licensing Site Cleanup Professionals program whereby a company would hire a State certified Licensed Site Cleanup Professional to develop and implement the plans for remediating a site. The Massachusetts Department of Environmental Protection would audit 20% of all cleanups. This program will serve the specific resource needs of the MA DEP.

We further recommend modification of the definition of voluntary cleanups found in S. 773 in order to avoid limiting how States may fund their voluntary cleanup programs. If a State does not establish its program with a cost reimbursement component, it should not be precluded from participating in this program. Nor should the approval requirements for the Economic Redevelopment Assistance Program loans section be so specific as to exclude certain States from participation in this program based on how they have structured their voluntary cleanup program.

Essentially ASTSWMO is advocating that the development of any national voluntary cleanup program be as flexible as possible to serve the needs of individual State programs and to maximize the benefit of State knowledge and expertise in remediating contaminated sites. State Waste Managers have always accepted full accountability for cleanup results and resource utilization, but need the flexibility to properly manage the remediation through application of sound professional judgement. We believe S. 773

should contain explicit language preventing U.S. EPA from developing any additional requirements beyond those listed in S. 773 for the development of State Voluntary Cleanup programs.

4. PERMIT REQUIREMENTS. Currently, there is no national exemption for non-NPL sites as there currently is for NPL sites. We believe this is an area warranting further consideration by Congressional, Federal and State staff to seek ways to equitably balance permit requirements with State oversight of the remedial project.

IN CONCLUSION:

We commend Senator Lautenberg for his legislative recognition of the importance of voluntary cleanups to State programs. Over the last thirteen years, two facts have become evident:

- 1) the number of contaminated sites requiring remediation is significantly larger than originally anticipated; and
- 2) most States have actively developed environmental cleanup programs.

S. 773 is a major step in acknowledging the full potential of State environmental cleanup programs. We urge the Congress to capitalize on the existence of the many strong State cleanup resources available, and to clarify the primary role State agencies have in implementing the voluntary cleanup programs for State managed non-NPL cleanup sites. Thank you for the opportunity to present our views on this important legislative initiative.



WRITTEN TESTIMONY
OF THE
CHEMICAL MANUFACTURERS ASSOCIATION
BEFORE THE
SUBCOMMITTEE ON SUPERFUND, RECYCLING AND SOLID WASTE MANAGEMENT
U.S. SENATE
HEARING ON S. 773
THE "VOLUNTARY ENVIRONMENTAL CLEANUP AND ECONOMIC
REDEVELOPMENT ACT OF 1993"

JUNE 17, 1993

The Chemical Manufacturers Association (CMA) appreciates the efforts of Chairman Lautenberg and the Members of the Superfund, Recycling and Solid Waste Management Subcommittee in holding hearings on S.773, the "Voluntary Environmental Cleanup and Economic Redevelopment Act of 1993." CMA welcomes the opportunity to submit this statement for the record.

CMA is a nonprofit trade association whose member companies represent more than 90 percent of the productive capacity for basic industrial chemicals in the United States. Today, the chemical industry provides approximately 1.1 million jobs for American workers and is the leading U.S. exporter, with total exports of \$43.0 billion, and a net trade surplus of \$18.8 billion in 1991. Incidental to manufacturing chemicals which make possible a wide variety of beneficial products, CMA member companies generate and manage hazardous waste. Therefore, many of our member companies may be interested in participating in the voluntary remediation programs established under S.773, with some modifications.

This statement first addresses what we believe are the major strengths of S.773. It then raises two principal areas (RCRA corrective action and Superfund) that CMA believes should be incorporated into the bill in order for the bill to achieve the greatest number of cleanups. Finally, this statement offers some suggestions for further refinement of the proposed legislation.

Introduction

S.773 would establish three distinct programs designed to encourage the voluntary cleanup of environmental contamination: (1) The Voluntary Cleanup Grant Program, which furnishes grants to states to establish or expand a State voluntary cleanup program; (2) The Site Characterization Program, which provides grants to local governments to conduct assessments of sites at which voluntary cleanups are being conducted, or are proposed to be conducted; and (3) the Economic Redevelopment Assistance Program, which provides low-interest loans to owners or prospective purchasers of sites in order to finance voluntary cleanups.

The three programs described in S.773 are designed to stimulate economic development by encouraging voluntary cleanups and the return of contaminated property to productive use. The approach adopted in S.733 is to promote the creation of state programs to encourage voluntary site remediation. Many states have already established programs which encourage and oversee the voluntary cleanup of contaminated property. A number of CMA members have participated in existing state programs and have found them both beneficial and effective.

CMA is strongly in favor of legislation that will facilitate voluntary corrective actions. In addition, CMA firmly believes that our society must now focus on transforming

contaminated, non-productive land ("brownfields") into productive, income- and job- generating properties. Thus, CMA strongly supports the broad goals and purposes of S.773. In addition, because we believe that existing state voluntary cleanup programs are practical and useful, we support the establishment of the Voluntary Cleanup Grant Program, which would encourage and fund, from general revenues, the creation of similar state programs. Finally, we support the Economic Redevelopment Assistance Program, which will further encourage voluntary remediation by providing the low-interest loans necessary to fund remedial efforts.

However, because it addresses only a subset of the universe of contaminated sites, S.773 in its current form stops short of creating a program that would more broadly facilitate voluntary cleanup, particularly the cleanup of the many RCRA corrective action sites and Superfund sites. In order to maximize economic redevelopment and associated environmental benefits, the existing corrective action policies under RCRA must be reformed. Moreover, an expanded universe of voluntary cleanup sites can result in the commencement of a greater number of cleanups and thus, can result in significantly greater environmental protection. Economic redevelopment can be further promoted by including most Superfund sites under the programs established by S.773.

The Need for RCRA Corrective Action Reform

S.773 is a good first step toward promoting remediation of contaminated sites. However, S.773 stops short of encouraging redevelopment and environmental remediation in an important category of contaminated sites, i.e., RCRA corrective action sites.

The Environmental Protection Agency (EPA) estimates that over 5,700 facilities containing approximately 100,000 solid waste management units are subject to RCRA corrective action. Yet, these existing sites would be needlessly excluded from the programs established under S.773 due to the restrictive definition of "affected site" found in section 3(2)(B)(iv). CMA strongly urges the deletion of that provision.

Estimates for the cleanup of RCRA corrective action sites range from \$18 billion to \$200 billion. Just as contaminated non-productive land saps economic vitality by preventing the creation of new, productive enterprises, the expenditure of such enormous amounts of money on RCRA corrective action also exhausts limited economic resources by draining away capital needed for expansion or retooling of these facilities which in turn can generate new jobs and additional income. In contrast, an economically efficient response to environmental cleanups would encourage voluntary cleanups, help achieve the most

efficient and cost-effective cleanup possible, and provide additional environmental protection.

A related concern involves section 4(c)(2) of S.773, which requires voluntary cleanups to "fully comply with all applicable requirements of Federal or State law." Consequently, an owner or prospective purchaser who proposed to clean up a contaminated site containing RCRA hazardous waste would be expected to comply fully with all RCRA requirements. Many current RCRA requirements, however, far exceed what is necessary to protect human health and the environment. For instance, RCRA's rigid land disposal restriction regulations, found at 40 C.F.R. Part 268, prohibit a flexible remediation approach based on site specific factors, such as current and foreseeable use of the property. Because the RCRA requirements are so burdensome and costly, few parties will initiate voluntarily remediations if those voluntary actions will trigger RCRA requirements. Thus, the inclusion of section 4(c)(2) in S.773 will render S. 773 less effective.

To remedy this problem, CMA recommends that S.773 provide that voluntary response actions undertaken pursuant to S.773 are deemed in compliance with the requirements of all applicable federal, state and local laws, and regulations including the National Contingency Plan. This clarification of S.773's relationship with other environmental programs is necessary in order to encourage parties to participate in voluntary

cleanups. Moreover, because S.773 directs states to approve only those response plans that have adequately reduced or eliminated risks to public health or the environment, compliance with the specific requirements of applicable federal, state and local laws is unnecessary. Finally, by deeming these cleanups consistent with the National Contingency Plan, those owners or purchasers who choose to do so may be able to recover some of their cleanup costs from other parties responsible for the contamination.

CMA further recommends that the RCRA corrective action program be revised to more accurately reflect true environmental and health hazards. Attached to this statement is CMA's statement of principles outlining suggested revisions to the RCRA corrective action program.

S. 773 Should Encourage Voluntary Remediation of Superfund Sites

The Superfund program established under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) also drains an enormous amount of money from our national resources. A recent study by the University of Tennessee indicates that the United States will spend between \$100 billion and \$200 billion for Superfund cleanups if remediation policies are not reformed and improved. As Senator Chafee, a co-sponsor of S.773, recognized, some of the same economic

concerns which inspired S.773 are equally applicable to the Superfund program. In his words: "should we be looking at some of the same incentives for redevelopment of Superfund sites that are presenting the more difficult redevelopment challenges? [The Superfund problem is] clearly one of equal or greater importance to future economic prosperity."¹ CMA agrees that Superfund is an enormous economic drain on the United States and believes that Superfund cleanups costs must be controlled.

To alleviate some of the economic burdens caused by the Superfund program, CMA recommends that S.773 be revised to include in the voluntary cleanup program those Superfund sites not on EPA's National Priority List (NPL). By excluding all NPL sites from the definition of "affected site," section 3(2)(B)(ii), prevents the use of S.773 to clean up any site which EPA has determined requires extensive oversight. But the blanket exclusion in section 3(2)(B)(i) of all Superfund sites is unnecessary and counterproductive. This sweeping provision could exclude many thousands of sites merely because the owner or prospective purchaser styles his voluntary remediation as a Superfund "response action" in order to enhance his ability to recover a portion of the cleanup costs from other parties responsible for the contamination. See 42 U.S.C. §

¹ 139 Cong. Rec. S4508 (daily ed. April 3, 1993) (statement of Sen. Chafee).

9607(a)(4)(b). CMA suggests that S.773 would be even more effective if this blanket exclusion was removed, thereby encouraging the voluntary remediation of non-National Priority List Superfund sites in addition to other non-productive "brown fields" sites.

Other Concerns About S.773

Despite our broad support for the goals of the "Voluntary Environmental Cleanup and Economic Redevelopment Act of 1993," CMA has a number of specific concerns about S.773 and thus offers several suggested refinements.

1. Limited scope of the bill. S.773 is too limited in scope. As written, the bill applies only to sites that do not pose "a serious threat to human health or the environment." Section 2(b). Because economic redevelopment of all contaminated sites is essential to a healthy economy, the bill should apply to a wide range of sites at which some degree of contamination is preventing economic redevelopment, not just those which pose minimal risks to human health and the environment. Moreover, the bill's application to all sites would accelerate the cleanup process for more contaminated sites.

2. Definition of "affected site." The bill's definition of "affected site" should be broadened in several

respects. Section 3(2)(A)(ii) refers to contamination that "is limited in scope." The phrase "limited in scope" can be interpreted to signify a quantity limitation or an area restriction. Not only is this phrase ambiguous, but it also adds little to the definition of "affected site."

Moreover, the exclusion in section 3(2)(B)(iv) of facilities already subject to corrective action is too broad and thereby excludes a significant number of potential voluntary cleanup sites. (As previously discussed, CMA believes all corrective action sites should be eligible to become "affected sites" under S.773. The following suggestions are offered in the event it is deemed important to maintain some form of exclusion.) Owners or prospective purchasers may have difficulty ascertaining whether or not a particular site is "subject to corrective action." Also, the exception should not exempt sites that have not yet begun corrective action, or are years away from cleanup. These concerns could be addressed by allowing voluntary cleanups at facilities that have not received a corrective action permit or order which specifies the implementation of corrective measures under section 3004(u) or 3008(h) of the Solid Waste Disposal Act.

Another very significant category of sites that would also be excluded from the bill's definition of "affected site" are sites containing polychlorinated biphenyls (PCBs). Section

3(B)(vi). There is no technical or scientific justification for the blanket exclusion of all sites containing PCBs. Not all sites containing PCBs present significant risks. On the contrary, EPA has recognized that "If there is no probability of exposure to the PCBs, and there is no reason to believe that there will be in the future, then the PCBs at the site poses no risk."² Thus, a site should not be excluded from the programs established by S.773 solely because PCBs are found at the site.

Finally, the definition of "affected sites" should also include non-National Priority list Superfund sites, as explained above.

3. Site Characterization Grant Program. S.773 must specify that the Site Characterization Grant Program, which provides grants to local governments to conduct site characterizations, is not intended to encourage local governments to seek out potential sites. It must be clear that grants provided to local governments are only to be used to characterize and assess sites which have voluntarily been brought to the attention of the local government by site owners. Without this clarification, this program could be

2

Superfund Fact Sheet: PCBs, EPA Office of Solid Waste and Emergency Response, Pub. No. 9230.0-05FSf (Sept. 1992).

implemented as a local site identification and cleanup coercion program rather than as a truly voluntary program.

4. Federal lien provisions. CMA is concerned about the business incentive effects of the federal lien on property receiving loan money under the Economic Redevelopment Assistance Program. By trumping the priorities established by state recording statutes, the program may actually discourage companies from conducting business with the borrower-company located at the newly remediated site. Because borrowers must demonstrate their financial need in order to obtain a loan under the Economic Redevelopment Assistance Program, they may already appear somewhat unattractive to potential business associates. A federal lien against the property, arising at the time the loan is granted and continuing until the terms and conditions of the loan agreement have been fully satisfied, will only serve to make these companies even less attractive to potential investors. Consequently, S.773 should be amended to provide that liens created in favor of the federal government only arise after compliance with state recording statutes.

5. State approval of cleanups. CMA recommends that state programs be required to give their stamp of approval to successfully completed remediation efforts. Once remediation is complete, the state must indicate publicly that the site is clean and no further cleanup will be required for past releases. A "sign off" that assures owners and prospective

purchasers that the site requires no further remediation unless new contamination occurs, fosters investment in the company located on the newly remediated site and provides an added incentive to engage in voluntary cleanup. Such investment is essential if "brown fields" are to be transformed into productive, income and job generating properties. CMA believes that the federal government may legitimately require such a release from liability as a condition to a state's receipt of federal grant money under the three programs established by S.773.

6. Funding for an expanded voluntary cleanup program.

If CMA's suggested modifications to S.773 are incorporated into the bill, the number of potential voluntary cleanup sites will be greatly expanded. An expanded program may require funding beyond what is currently included in the bill in order for the Agency to implement the program and provide related grants. To the extent to which such additional funding is necessary, and since such activity is clearly in the interest of society as a whole, CMA suggests that these funds be appropriated from general revenues and not from existing program funds.

Conclusion

With the above remarks in mind, CMA views S.773 as a constructive first step in encouraging needed environmental remediation and economic redevelopment. CMA thanks you for this opportunity to present our views on the "Voluntary Environmental Cleanup and Economic Redevelopment Act of 1993." We would be happy to meet with you or any member of the Subcommittee, or your respective staffs to answer any questions or to discuss our specific legislative recommendations with respect to S. 773. We would also be happy to share our thoughts regarding necessary legislative reforms to Superfund and reform of RCRA's corrective action program.

LEGISLATIVE PRINCIPLES
FOR
AMENDING RCRA CORRECTIVE

ACTION

The jurisdictional reach of the RCRA Corrective Action Program should not be expanded. However, the enacting legislation should be amended to incorporate the following principles.

1. A corrective measure should only be required to respond to a significant risk to human health or the environment.
2. The determination of significant risk must be based on sound scientific principles considering site-specific factors (such as current and reasonably foreseeable land uses and realistic exposure scenarios).
3. Any corrective measure selected to respond to a significant risk must be technically practicable and cost-effective.
4. Corrective measures should be exempt from RCRA permitting and technical requirements (such as LDRs and MTRs), provided that they are conducted under agency oversight.
5. Site stabilization, the expeditious implementation of corrective measures to mitigate risk, should be given initial preference.
6. Corrective measures should be re-evaluated whenever any site-specific factor changes sufficiently to significantly alter risk to human health and/or the environment.
7. Corrective action oversight should be the responsibility of one agency.
8. Financial assurance should not be required for sound operating companies (for example, companies with a good bond rating). Needed financial assurance should be structured so as to maintain the financial ability of the owner to sustain the corrective measures.
9. Barriers to voluntary corrective action should also be eliminated. Consistent with the principles identified above, where states provide oversight they should have the authority to exempt voluntary corrective action from RCRA permitting and technical requirements.

**Mortgage Bankers
Association of America**

Warren Luska
Executive Vice President
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The National Association
of Real Estate Finance

June 15, 1993



The Honorable Frank R. Lautenberg
Chairman
Subcommittee on Superfund, Recycling and Solid Waste
Committee on Environment and Public Works
United States Senate
456 Dirksen Senate Office Building
Washington, DC 20510

Dear Mr. Chairman:

The Mortgage Bankers Association of America (MBA)¹ appreciates the opportunity to present our views and express our support for the purposes of S 773, the " Voluntary Environmental Cleanup and Economic Redevelopment Act of 1993." Specifically, our comments will focus on the effect of the bill on real estate lenders.

Overview. In recent years, Congress, executive agencies, and the Federal courts have established policies that require private actions to address and correct environmental hazards. S 773 would further this goal.

MBA supports a national commitment to protecting the environment and the public health from the deleterious effects of pollution and hazardous substance contamination. However, where real estate transactions are involved, Congress, the agencies, and the courts should delicately balance environmental protection requirements with the need for efficiency in the housing and commercial development markets.

MBA believes that efforts to protect the environment should take into consideration that environmental protection and cleanup of hazardous substances should complement the efficient working of the real estate finance, housing, and commercial development markets. To the extent that guidelines or standards are developed, they should reflect the need for

¹MBA is the national association representing exclusively the real estate finance industry. Headquartered in Washington, D.C., the association works to ensure the continued strength of the Nation's residential and commercial real estate markets; to expand homeownership prospects through increased affordability; and to extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters excellence and technical know-how among real estate finance professionals through a wide range of educational programs and technical publications. Its membership of over 2,600 companies includes all elements of real estate finance: mortgage companies; savings and loan associations; commercial banks, savings banks; life insurance companies; state housing finance agencies; and others in the mortgage lending field.

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predictability in real estate transactions through objective environmental standards, unambiguous allocation of responsibility, uniform enforcement, and the enunciation of clear rules that will be understood by the public at large and the real estate financial community.

Background. MBA seeks clarification of the secured creditor exemption under Superfund (42 U.S.C., Sec. 20(a)). This clarification would allow lenders to continue to exercise the legal rights associated with the security interest on a property, e.g., foreclosure and steps undertaken to work out problem loans, such as management changes or debt rescheduling. Court decisions threaten lenders' ability to take such actions out of fear of incurring liability for the entire cost of site cleanup. Recently published regulations by the Environmental Protection Agency (EPA) will assist in the clarification of the lender liability issue. However, Congressional action is needed to codify the EPA policy and to expand lender exemptions to Superfund and the Resource Conservation and Recovery Act (RCRA). S 773 takes innovative and creative steps to encourage voluntary cleanup of limited contaminated sites.

By reducing the uncertainty that accompanies the cleanup of contaminated real estate, this legislation encourages private parties to undertake remedial actions to restore value to owned real estate. S 773 demonstrates a Congressional commitment to economic redevelopment of contaminated commercial real estate. If the stigma of environmental contamination can be successfully removed from commercial properties, the public purpose to clean up and economically revitalize such real property for the benefit of the community will be served. In addition, opportunities will be expanded and enhanced for those involved in commercial real estate finance.

S 773, the "Voluntary Environmental Cleanup and Economic Redevelopment Act of 1993."

The Economic Redevelopment Assistance Program. S 773 is crafted to assist significantly with redevelopment of abandoned or underutilized real estate. However, this section of the bill may be the most difficult to implement. Specifically, MBA believes it would be inappropriate for the EPA to approve or award loans for cleanup. Decisions regarding the allocation of credit should be more appropriately left to lending institutions, with loan guarantees to encourage this specialized type of lending.

EPA participation could be encouraged in the granting of credit for these transactions, while insuring that the lending experience of financial institutions is appropriately utilized. For example, in the bill, owners are required to provide "written certification that attests that the applicant has attempted, and has been unable, to secure financing from a private lending institution for the cleanup action that is the subject of the loan application." In many instances, it would be very difficult for a property owner to demonstrate that credit would not be granted due solely because of contamination.

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To safeguard against prospective abuse of funds, the bill should be amended to require disbursement of government funds to a trust or mortgagee agreed upon by the borrower and any lien holders. MBA believes that safeguards must be added to this process in order to insure equitable treatment of all parties involved in the voluntary cleanup process.

S 773 creates a "superlien" that is stronger than the Federal Government's lien under Superfund. This provision secures a borrower's obligation to repay the government for funds advanced to the borrower for the purpose of paying for cleanup. In its current form, the bill does not require notification to a lienholder of funds advanced by a borrower for remedial actions. Moreover, S 773 does not require the borrower to involve the existing lienholder in formulation of the cleanup plan. As a result of the absence of these provisions, the holders of existing liens would lose priority to the Federal Government. If the government lien were changed to an ordinary lien without the overriding priority, this imbalance could be averted.

The bill provides that "if sale or redevelopment of the affected site" results in a net profit "greater than or equal to 10 percent," the owner will be required to reimburse the Federal Government for the "full and actual costs" of making the loan, as well as any administrative costs. It would be helpful if the administrative costs referred to in this subsection of the bill could be more clearly defined. It will be difficult to ascertain "net profit" attributable to the "sale or redevelopment of the affected site," as well as the corresponding reimbursement required based on this profit. MBA believes that the administrative burden that is associated with this provision will be onerous, and costs to enforce this provision will also be prohibitively high.

MBA believes the bill would be improved by extending protection to lenders who are concerned about liability with respect to non-Superfund sites. In fact, MBA believes that it would be appropriate to expect that a person who undertakes cleanup pursuant to appropriate regulatory guidelines should be guaranteed protection from future liability.

The Voluntary Cleanup Grant Program. S 773 requires "adequate opportunities for public participation, including prior notice and opportunity for comment, in selecting response actions." MBA believes that response actions and remedial action should be negotiated between the owner, affected parties, and appropriate regulatory officials. In this manner, cleanup decisions will be made in a timely fashion, without public hearings that would unduly slow the cleanup process.

The annual certification requirements of this program assuring that voluntary cleanups that are achieved or undertaken "fully comply with all applicable requirements of Federal or State law" and "have reduced or eliminated health and environmental risks to the satisfaction of the State" are very helpful. This section would be enhanced by a provision that would provide for advanced certification of cleanup to be performed in accordance with agreed upon plans. It is believed that this type of pre-set cleanup standard

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would insure that expense estimates for cleanup are reliable, and would reduce uncertainty that would slow redevelopment. In addition, a predetermined cleanup standard would insure that a regulatory "sign off" is meaningful, preventing any future controversy regarding the level of cleanliness that is appropriate for a given property.

Conclusion. MBA supports the approach of S 773, the "Voluntary Environmental Cleanup and Economic Redevelopment Act of 1993." The bill would reduce uncertainty that often accompanies the cleanup of contaminated real estate, and it would encourage private parties to undertake remedial actions to restore value to owned real estate. S 773 demonstrates your commitment to economic redevelopment of contaminated commercial real estate. This legislation is an important step forward in addressing the needs of the private sector to eliminate contaminated real estate and the public purpose to cleanup and revitalize such real property for the benefit of the community.

Once again, MBA commends you and the Members of the Subcommittee for your efforts to address lender liability. MBA appreciates the opportunity to submit a statement in conjunction with your June 17 hearing.

We would be pleased to furnish any additional information needed by the Subcommittee. Please contact Jim Freeman at (202) 861-8184, if you have further questions or need additional information.

Sincerely,

A handwritten signature in dark ink, appearing to read "Warren Lasko", written in a cursive style.

Warren Lasko



National
Association of
Towns and Townships

- April 26, 1993

The Honorable Frank R. Lautenberg
Chairman
Subcommittee on Superfund, Ocean and Water Protection
United States Senate
506 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Lautenberg:

I am writing on behalf of the 13,000 mostly small, mostly rural communities represented by the National Association of Towns and Townships (NATaT) regarding S. 773, the *Voluntary Environmental Cleanup and Economic Redevelopment Act of 1993*. NATaT supports this bill which would promote state volunteer cleanup programs and economic development of non-Superfund hazardous waste sites. As outlined in your bill, the subsequent redevelopment of these facilities will provide needed new business and employment opportunities for local communities.

NATaT appreciates your efforts to ensure local involvement in this process. Federal and state coordination with local governments is a prerequisite for promoting effective development plans and formulating long-term strategies for small communities.

Again, thank you for your attention to this important matter.

Sincerely,

Jeffrey H. Schiff
Executive Director

103D CONGRESS
1ST SESSION

S. 773

To require the Administrator of the Environmental Protection Agency to establish a program to encourage voluntary environmental cleanup of facilities to foster their economic redevelopment, and for other purposes.

IN THE SENATE OF THE UNITED STATES

APRIL 3 (legislative day, MARCH 3), 1993

Mr. LAUTENBERG (for himself, Mr. BAUCUS, Mr. CHAFEE, Mr. DURENBERGER, Mr. KRUEGER, Mr. LIEBERMAN, Mr. METZENBAUM, Mr. REID, Mr. SIMON, Mr. WARNER, and Mr. WOFFORD) introduced the following bill; which was read twice and referred to the Committee on Environment and Public Works

A BILL

To require the Administrator of the Environmental Protection Agency to establish a program to encourage voluntary environmental cleanup of facilities to foster their economic redevelopment, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "Voluntary Environ-
5 mental Cleanup and Economic Redevelopment Act of
6 1993".

1 **SEC. 2. FINDINGS.**

2 (a) FINDINGS.—Congress finds that—

3 (1) past uses of land in the United States for
4 industrial and commercial purposes have created
5 many sites throughout the United States that have
6 environmental contamination;

7 (2) Congress and the governments of States
8 and political subdivisions of States have enacted
9 laws to—

10 (A) prevent environmental contamination;
11 and

12 (B) carry out response actions to correct
13 past instances of environmental contamination;

14 (3) many sites are minimally contaminated, do
15 not pose serious threats to human health or the en-
16 vironment, and can be satisfactorily remediated ex-
17 peditiously with little government oversight;

18 (4) promoting the cleanup and redevelopment of
19 contaminated sites could lead to significant environ-
20 mental and economic benefits, particularly in any
21 case in which a cleanup can be completed quickly
22 and during a period of time that meets short-term
23 business needs;

24 (5) the private market demand for sites af-
25 fected by environmental contamination frequently is
26 reduced or eliminated, often due to uncertainties re-

3

1 garding liability or potential cleanup costs of current
2 owners and prospective purchasers under Federal
3 and State law;

4 (6) the abandonment or underutilization of af-
5 fected sites impairs the ability of the Federal Gov-
6 ernment and the governments of States and political
7 subdivisions of States to provide economic opportu-
8 nities for the people of the United States, particu-
9 larly the poor and unemployed;

10 (7) the abandonment or underutilization of af-
11 fected sites also results in the inefficient use of pub-
12 lic facilities and services, as well as land and other
13 natural resources, and extends conditions of blight
14 in local communities;

15 (8) cooperation among Federal agencies, de-
16 partments and agencies of States and political sub-
17 divisions of States, and owners and prospective pur-
18 chasers of affected sites is required to accomplish
19 timely response actions and redevelopment or reuse
20 of affected sites;

21 (9) there is a need for a program to—

22 (A) encourage voluntary cleanups of af-
23 fected sites; and

4

1 (B) facilitate the establishment of pro-
2 grams by States to foster voluntary cleanups of
3 affected sites;

4 (10) there is a need to provide financial assist-
5 ance to local governments to characterize certain af-
6 fected sites in order to facilitate the cleanup of the
7 sites so that the sites may be redeveloped for eco-
8 nomically beneficial uses; and

9 (11) there is a need to provide financial incen-
10 tives and assistance to qualified parties to clean up
11 certain affected sites so that the sites may be rede-
12 veloped for economically beneficial uses.

13 (b) PURPOSES.—The purposes of this Act are to cre-
14 ate new business and employment opportunities through
15 the economic redevelopment of affected sites that do not
16 pose a serious threat to human health or the environment
17 by—

18 (1) encouraging States to adopt and develop a
19 program for sites that would not currently be reme-
20 diated under other environmental laws (including
21 regulations) in effect on the date of enactment of
22 this Act;

23 (2) encouraging private parties to participate in
24 State voluntary cleanup programs that facilitate ex-

1 pedited response actions that are consistent with
2 business needs at affected sites;

3 (3) directing the Administrator to establish pro-
4 grams providing financial assistance to—

5 (A) encourage the development of State
6 voluntary cleanup programs;

7 (B) facilitate site characterizations of cer-
8 tain affected sites; and

9 (C) encourage cleanup of appropriate sites;
10 and

11 (4) reducing transaction costs and paperwork,
12 and preventing needless duplication of effort and
13 delay at all levels of government.

14 **SEC. 3. DEFINITIONS.**

15 Except if the context specifically provides otherwise,
16 as used in this Act:

17 (1) ADMINISTRATOR.—The term “Adminis-
18 trator” means the Administrator of the Environ-
19 mental Protection Agency.

20 (2) AFFECTED SITE.—

21 (A) IN GENERAL.—The term “affected
22 site” means a facility that has environmental
23 contamination that—

6

(i) could prevent the timely use, development, reuse or redevelopment of the facility; and

(ii) is limited in scope and can be comprehensively characterized and readily analyzed.

(B) EXCEPTION.—Such term shall not include—

(i) any facility that is the subject of a planned or an ongoing response action under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601 et seq.);

(ii) any facility included, or proposed for inclusion, in the National Priorities List maintained by the Administrator under such Act;

(iii) any facility with respect to which a record of decision has been issued by the President under section 104 of such Act (42 U.S.C. 9604);

(iv) any facility that is subject to corrective action under section 3004(u) or 3008(h) of the Solid Waste Disposal Act (42 U.S.C. 6924(u) or 6928(h)) at the

1 time that an application for a grant or
2 loan concerning the facility is submitted
3 under this Act, including any facility with
4 respect to which a corrective action permit
5 or order has been issued or modified to re-
6 quire the implementation of corrective
7 measures;

8 (v) any land disposal unit with respect
9 to which a closure notification under sub-
10 title C of the Solid Waste Disposal Act (42
11 U.S.C. 6921 et seq.) has been submitted
12 and closure requirements have been speci-
13 fied in a closure plan or permit;

14 (vi) any facility that contains poly-
15 chlorinated biphenyls subject to response
16 under section 6(e) of the Toxic Substances
17 Control Act (15 U.S.C. 2605(e));

18 (vii) any facility with respect to which
19 an administrative order on consent or judi-
20 cial consent decree requiring cleanup has
21 been entered into by the President under
22 the Comprehensive Environmental Re-
23 sponse, Compensation, and Liability Act of
24 1980 (42 U.S.C. 9601 et seq.), the Solid
25 Waste Disposal Act (42 U.S.C. 6901 et

1 seq.), the Federal Water Pollution Control
2 Act (33 U.S.C. 1251 et seq.), the Toxic
3 Substances Control Act (15 U.S.C. 2601
4 et seq.) or title XIV of the Public Health
5 Service Act, commonly known as the Safe
6 Drinking Water Act (42 U.S.C. 300f et
7 seq.);

8 (viii) any facility controlled by, or to
9 be remediated by, a department, agency, or
10 instrumentality of the executive branch of
11 the Federal Government; and

12 (ix) any facility at which assistance
13 for response activities may be obtained
14 pursuant to subtitle I of the Solid Waste
15 Disposal Act (42 U.S.C. 6991 et seq.)
16 from the Leaking Underground Storage
17 Tank Trust Fund established under sec-
18 tion 9508 of the Internal Revenue Code of
19 1986.

20 (3) CONTAMINANT.—The term “contaminant”
21 includes any hazardous substance, as defined in sec-
22 tion 101(14) of the Comprehensive Environmental
23 Response, Compensation, and Liability Act of 1980
24 (42 U.S.C. 9601(14)) and oil, as defined in section

9

1 1001(23) of the Oil Pollution Act of 1990 (33
2 U.S.C. 2701(23)).

3 (4) CURRENT OWNER.—The term “current
4 owner” means, with respect to a voluntary cleanup,
5 an owner that is an owner at the time of the clean-
6 up.

7 (5) DISPOSAL.—The term “disposal” has the
8 meaning provided the term in section 1004(3) of the
9 Solid Waste Disposal Act (42 U.S.C. 6903(3)).

10 (6) ENVIRONMENTAL CONTAMINATION.—The
11 term “environmental contamination” means the ex-
12 istence at a facility of 1 or more contaminants that
13 may pose a health or environmental risk.

14 (7) ENVIRONMENT.—The term “environment”
15 has the meaning provided the term in section 101(8)
16 of the Comprehensive Environmental Response,
17 Compensation, and Liability Act of 1980 (42 U.S.C.
18 9601(8)).

19 (8) FACILITY.—The term “facility” has the
20 meaning provided the term in section 101(9) of such
21 Act (42 U.S.C. 9601(9)).

22 (9) GROUND WATER.—The term “ground
23 water” has the meaning provided the term in section
24 101(12) of such Act (42 U.S.C. 9601(12)).

1 (10) INDIAN TRIBE.—The term “Indian tribe”
2 has the meaning provided the term in section
3 101(36) of the Comprehensive Environmental Re-
4 sponse, Compensation, and Liability Act of 1980 (42
5 U.S.C. 9601(36)).

6 (11) LOCAL GOVERNMENT.—The term “local
7 government” means the governing body of a political
8 subdivision of a State, including the governing body
9 of any county, parish, municipality, city, town, town-
10 ship, Federally-recognized Indian tribe or similar
11 governing body.

12 (12) NATURAL RESOURCES.—The term “natu-
13 ral resources” has the meaning provided the term in
14 section 1001(16) of the Comprehensive Environ-
15 mental Response, Compensation, and Liability Act
16 of 1980 (42 U.S.C. 9601(16)).

17 (13) OWNER.—The term “owner” has the
18 meaning provided the term in section 101(20) of
19 such Act (42 U.S.C. 9601(20)), except that the term
20 shall also include a unit of State or local government
21 that acquired ownership or control involuntarily
22 through bankruptcy, tax delinquency, abandonment,
23 or other circumstances in which the government ac-
24 quires title by virtue of its functions as a sovereign.

1 (14) PERSON.—The term “person” has the
2 meaning provided the term in section 101(21) of
3 such Act (42 U.S.C. 9601(21)).

4 (15) PROSPECTIVE PURCHASER.—The term
5 “prospective purchaser” means a prospective pur-
6 chaser of an affected site.

7 (16) RELEASE.—The term “release” has the
8 meaning provided the term in section 101(22) of
9 such Act (42 U.S.C. 9601(22)).

10 (18) RESPONSE ACTION.—The term “response
11 action” has the meaning provided the term “re-
12 sponse” in section 102(25) of such Act (42 U.S.C.
13 9601(25)).

14 (19) SITE CHARACTERIZATION.—

15 (A) IN GENERAL.—The term “site charac-
16 terization” means an investigation that deter-
17 mines the nature and extent of a release or po-
18 tential release of a hazardous substance and
19 meets the requirements referred to in subpara-
20 graph (B).

21 (B) INVESTIGATION.—For the purposes of
22 this paragraph, an investigation that meets the
23 requirements of this subparagraph shall include
24 an onsite evaluation, and sufficient testing,
25 sampling and other field data gathering activi-

1 ties to accurately analyze whether the site is
2 contaminated and the health and environmental
3 risks posed by the release of contaminants at
4 the site. The investigation may also include re-
5 view of existing information (available at the
6 time of the review) and an offsite evaluation, if
7 appropriate.

8 (20) VOLUNTARY CLEANUP.—The term “vol-
9 untary cleanup” means a response action at an af-
10 fected site—

11 (A) undertaken and financed by a current
12 owner or prospective purchaser owner subject to
13 oversight and approval by a State; and

14 (B) with respect to which the current
15 owner or prospective purchaser agrees to pay all
16 costs of oversight by the State.

17 **SEC. 4. VOLUNTARY CLEANUP GRANT PROGRAM.**

18 (a) IN GENERAL.—

19 (1) ESTABLISHMENT OF GRANT PROGRAM.—

20 The Administrator shall establish a program to pro-
21 vide a grant to any State that submits an applica-
22 tion that is approved by the Administrator to estab-
23 lish or expand a State voluntary cleanup program
24 that meets the requirements of paragraph (3).

1 (2) CERTIFICATION.—In an application for a
2 grant under this section, a State shall be required
3 to certify that the voluntary cleanup program of the
4 State will meet the requirements of paragraph (3).

5 (3) REQUIREMENTS FOR STATE VOLUNTARY
6 CLEANUP PROGRAM.—A State voluntary cleanup
7 program meets the requirements of this paragraph if
8 the State—

9 (A) provides adequate opportunities for
10 public participation, including prior notice and
11 opportunity for comment, in selecting response
12 actions;

13 (B) provides technical assistance through-
14 out each voluntary cleanup;

15 (C) has the capability of assuming the re-
16 sponsibility for undertaking a cleanup if the
17 current owner or prospective purchaser fails or
18 refuses to complete the necessary cleanup; and

19 (D) provides adequate oversight and has
20 adequate enforcement authorities to ensure that
21 voluntary cleanups are completed in accordance
22 with all applicable Federal and State require-
23 ments, including any ongoing operation and
24 maintenance or long-term monitoring activities.

25 (b) GRANT AWARDS.—

1 (1) IN GENERAL.—In carrying out the program
2 established under subsection (a), the Administrator
3 shall, subject to the availability of appropriations,
4 award a grant to the Governor of each State that
5 submits an application to the Administrator that
6 meets the requirements of this section to conduct a
7 State voluntary cleanup program that the Adminis-
8 trator approves.

9 (2) GRANT AMOUNT.—The amount of a grant
10 awarded to any State under subsection (a) shall be
11 determined by the Administrator on the basis of the
12 financial need of the State for establishing or ex-
13 panding a voluntary cleanup program, and shall be
14 in an amount not less than \$200,000, but not to ex-
15 ceed \$500,000 for each fiscal year.

16 (3) REPORTING.—Each State that receives a
17 grant under subsection (a) shall submit to the Ad-
18 ministrator, not later than 2 years after receipt of
19 the grant, a progress report that includes a descrip-
20 tion of the cleanups made in accordance with the
21 voluntary cleanup program of the State.

22 (4) TERMINATION OF GRANTS.—If the Admin-
23 istrator determines that a State voluntary cleanup
24 program no longer meets the requirements of sub-
25 section (a)(3), the Administrator may terminate a

1 grant made to the State, and require full or partial
2 repayment of the grant award.

3 (c) STATE CERTIFICATION.—Each Governor of a
4 State that receives a grant under this section shall not
5 later than 1 year after receipt of an initial grant, and an-
6 nually thereafter, submit to the Administrator a certifi-
7 cation that states—

8 (1) the State voluntary cleanup program meets
9 the criteria referred to in subsection (a);

10 (2) all cleanups achieved or undertaken pursu-
11 ant to the State voluntary cleanup program fully
12 comply with all applicable requirements of Federal
13 or State law;

14 (3) public participation opportunities have been
15 adequate during the process of selecting a cleanup
16 method for each voluntary cleanup;

17 (4) voluntary cleanups achieved or undertaken
18 pursuant to the State voluntary cleanup program
19 have been undertaken in a manner that has reduced
20 or eliminated health and environmental risks to the
21 satisfaction of the State; and

22 (5) for any voluntary cleanup initiated pursuant
23 to the State voluntary cleanup program that has in-
24 creased health and environmental risks, the State

1 has taken timely and appropriate steps to reduce or
2 eliminate the health and environmental risks.

3 (d) STATUTORY CONSTRUCTION.—Nothing in this
4 Act is intended—

5 (1) to impose any requirement on a State vol-
6 untary cleanup program existing on or after the date
7 of enactment of this Act if the Governor of the State
8 has not been awarded a grant under this section; or

9 (2) to preclude a Governor of a State with a
10 voluntary cleanup program referred to in paragraph
11 (1) from submitting an application for a grant under
12 this section.

13 **SEC. 5. SITE CHARACTERIZATION GRANT PROGRAM.**

14 (a) IN GENERAL.—The Administrator shall establish
15 a program to provide grants to local governments to con-
16 duct site characterizations for affected sites at which vol-
17 untary cleanups are being conducted or are proposed to
18 be conducted under a State voluntary cleanup program
19 that is the subject of a grant award under section 4.

20 (b) SCOPE OF PROGRAM.—

21 (1) GRANT AWARDS.—In carrying out the pro-
22 gram established under subsection (a), the Adminis-
23 trator may award a grant to the head of each local
24 government that submits to the Administrator an
25 application (that is approved by the Administrator)

1 to conduct a site characterization at an affected site
2 within the jurisdiction of the local government.

3 (2) GRANT APPLICATION.—An application for a
4 grant under this section shall—

5 (A) include a description of the affected
6 site;

7 (B) include information demonstrating the
8 financial need of the owner of the affected site
9 for funds to conduct a site characterization;

10 (C) include an analysis that demonstrates
11 the potential of the affected site for stimulating
12 economic development on completion of the
13 cleanup of the site; and

14 (D) provide such other information, and be
15 in such form, as the Administrator determines
16 appropriate to carry out this Act.

17 (3) APPROVAL OF APPLICATION.—

18 (A) IN GENERAL.—In making a decision
19 whether to approve an application submitted
20 under paragraph (1), the Administrator shall
21 consider—

22 (i) the financial need of the owner of
23 the affected site for funds to conduct a site
24 characterization;

18

1 (ii) the demonstrable potential of the
2 affected site for stimulating economic de-
3 velopment on completion of the cleanup of
4 the affected site if the cleanup is nec-
5 essary;

6 (iii) the estimated fair market value of
7 the site after cleanup;

8 (iv) other economically viable, com-
9 mercial activity on real property—

10 (I) located within the immediate
11 vicinity of the affected site at the time
12 of consideration of the application; or

13 (II) projected to be located with-
14 in the immediate vicinity of the af-
15 fected site by the date that is 5 years
16 after the date of the consideration of
17 the application;

18 (v) the potential of the affected site
19 for creating new business and employment
20 opportunities on completion of the cleanup
21 of the site;

22 (vi) whether the affected site is lo-
23 cated in an economically distressed com-
24 munity; and

1 (vii) such other factors as the Admin-
2 istrator considers relevant to carry out the
3 purposes of the grant program established
4 under this section.

5 (B) GRANT CONDITIONS.—As a condition
6 for awarding a grant under this section, the
7 Administrator may, on the basis of the criteria
8 considered under subparagraph (A), attach
9 such conditions to the grant award as the Ad-
10 ministrator determines appropriate.

11 (4) GRANT AMOUNT.—The amount of a grant
12 awarded to any local government under subsection
13 (a) for characterization of an affected site shall not
14 exceed \$100,000.

15 (5) TERMINATION OF GRANTS.—If the Admin-
16 istrator determines that a local government that re-
17 ceives a grant under this subsection is in violation
18 of a condition of a grant award referred to in para-
19 graph (2), the Administrator may terminate the
20 grant made to the local government and require full
21 or partial repayment of the grant award.

22 **SEC. 6. ECONOMIC REDEVELOPMENT ASSISTANCE PRO-**
23 **GRAM.**

24 (a) IN GENERAL.—

1 (1) ESTABLISHMENT OF PROGRAM.—The Ad-
2 ministrators shall establish a program to provide a
3 loan to be used for the cleanup of affected sites to
4 an owner or a prospective purchaser of an affected
5 site (including a local government) at which a vol-
6 untary cleanup is being conducted or is proposed to
7 be conducted under a State voluntary cleanup pro-
8 gram that is the subject of a grant award under
9 section 4.

10 (2) DISQUALIFICATION.—If the Administrator
11 determines that an applicant has adequate resources
12 to conduct, in the absence of financial assistance
13 provided under this section, a cleanup that is the
14 subject of a loan application, the Administrator shall
15 not approve the application.

16 (b) SCOPE OF PROGRAM.—

17 (1) IN GENERAL.—

18 (A) LOANS.—The Administrator may
19 award a loan to be used to clean up an affected
20 site to each eligible applicant described in sub-
21 section (a)(1) that submits an application to the
22 Administrator that is approved by the Adminis-
23 trator.

24 (B) LOAN APPLICATION.—An application
25 for a loan under this section shall be in such

21

1 form as the Administrator determines appropriate. At a minimum, the application shall include the following:

4 (i) A description of the affected site,
5 including the nature and extent of any
6 known or suspected environmental con-
7 tamination at the affected site and the
8 legal description of the real property asso-
9 ciated with the affected site.

10 (ii) A complete description of the fi-
11 nancial standing of the applicant that in-
12 cludes a description of the assets, cash
13 flow, and liabilities of the applicant.

14 (iii) A written certification that at-
15 tests that the applicant has attempted, and
16 has been unable, to secure financing from
17 a private lending institution for the clean-
18 up action that is the subject of the loan
19 application. The certification shall
20 specify—

21 (I) the name of each private
22 lending institution to which the appli-
23 cant submitted an application for a
24 loan; and

22

1 (II) with respect to each applica-
2 tion to a lending institution referred
3 to in subclause (I)—

4 (aa) the date that the loan
5 application was submitted and
6 the date that the applicant was
7 notified of the refusal;

8 (bb) the amount of the loan
9 requested;

10 (cc) the term of the loan re-
11 quested;

12 (dd) proof of the refusal of
13 the loan by the lending institu-
14 tion; and

15 (ee) the reasons given, if
16 any, by the private lending insti-
17 tution for the refusal of the loan
18 for the cleanup.

19 (iv) A justification for the amount of
20 the financial assistance requested, includ-
21 ing evidence that the amount of financial
22 assistance requested by the applicant is not
23 available to the applicant through other
24 sources.

23

1 (v) The proposed method, and antici-
2 pated period of time required, to clean up
3 the environmental contamination at the
4 affected site.

5 (vi) An estimate of the proposed total
6 cost of the cleanup to be conducted at the
7 site.

8 (vii) An analysis that demonstrates
9 the potential of the affected site for stimu-
10 lating economic development on completion
11 of the cleanup of the site.

12 (2) LOAN APPROVAL.—In determining whether
13 to award a loan under this section, the Adminis-
14 trator shall consider—

15 (A) the need of the applicant for financial
16 assistance to clean up the affected site that is
17 the subject of the loan application, taking into
18 consideration the financial resources available
19 to the applicant;

20 (B) the ability of the applicant to repay
21 the loan in a timely manner;

22 (C) the inability of the applicant to secure
23 a loan from a private lending institution or
24 through other means of financing;

1 (D) the extent to which the cleanup of the
2 affected site would reduce health and environ-
3 mental risks caused by the release of contami-
4 nants at, or from, the affected site; and

5 (E) the demonstrable potential of the af-
6 fected site for stimulating economic develop-
7 ment on completion of the cleanup, including—

8 (i) the estimated fair market value of
9 the affected site after cleanup;

10 (ii) other economically viable, commer-
11 cial activity on real property—

12 (I) located in the immediate vi-
13 cinity of the affected site at the time
14 of consideration of the application; or

15 (II) projected to be located with-
16 in the immediate vicinity of the af-
17 fected site by the date that is 5 years
18 after the date of the consideration of
19 the application;

20 (iii) the potential of the affected site
21 for creating new, or expanding existing,
22 business and employment opportunities on
23 completion of the cleanup of the site;

1 (iv) the estimated additional tax reve-
2 nues expected to be generated at the site
3 by the economic redevelopment;

4 (v) whether the site is located in an
5 economically distressed community;

6 (vi) whether the cleanup and the pro-
7 posed redevelopment is consistent with any
8 applicable State or local community eco-
9 nomic development plan; and

10 (vii) such other factors as the Admin-
11 istrator considers relevant to carry out the
12 purposes of the loan program established
13 under this section.

14 (3) LOAN AMOUNT.—The amount of a loan
15 made to an applicant under this section shall not
16 exceed—

17 (A) 75 percent of the cost of the cleanup
18 that is the subject of the loan; or

19 (B) \$750,000,

20 whichever is less.

21 (4) STATE APPROVAL.—Each application for a
22 loan under this section shall, as a condition for ap-
23 proval by the Administrator, include a written state-
24 ment by the State under whose voluntary program

1 the voluntary cleanup is being conducted, or pro-
2 posed to be conducted that—

3 (A) the voluntary cleanup or proposed vol-
4 untary cleanup is cost effective; and

5 (B) the estimated total cost of the vol-
6 untary cleanup is reasonable.

7 (c) LOAN AGREEMENTS.—Each loan under this sec-
8 tion shall be made pursuant to a loan agreement. At a
9 minimum, the loan agreement shall include provisions that
10 address the following items:

11 (1)(A) The loan shall bear interest at the appli-
12 cable rate specified in subparagraphs (B) through
13 (D).

14 (B) For local government entities, the rate of
15 interest shall be 1 percentage point below the aver-
16 age current yield on marketable obligations of the
17 United States Treasury having comparable matu-
18 rities.

19 (C) For prospective purchasers of an affected
20 site, the rate of interest shall be 1 percentage point
21 above the average current yield on marketable obli-
22 gations of the United States Treasury having com-
23 parable maturities.

24 (D) For current owners of an affected site, the
25 rate of interest shall be 2 percentage points above

1 the average current yield on marketable obligations
2 of the United States Treasury having comparable
3 maturities.

4 (2) The maturity period of the loan (as deter-
5 mined by the Administrator) shall not exceed 10
6 years.

7 (3) The repayment of the loan during the matu-
8 rity period shall be in accordance with any schedule
9 for payments that the Administrator may specify in
10 the loan agreement.

11 (4) Each payment referred to in paragraph (3)
12 shall be made to the Secretary of the Treasury for
13 deposit in the general fund of the Treasury.

14 (5) If the sale or redevelopment of the affected
15 site results in a net profit to the applicant (taking
16 into consideration any amount of reimbursement
17 that may be required under this paragraph) in an
18 amount greater than or equal to 10 percent, in addi-
19 tion to paying interest on the loan (as specified in
20 paragraph (1)), the applicant shall make a payment
21 to reimburse the Federal Government for the full
22 and actual costs incurred by the Federal Govern-
23 ment of making the loan to the applicant, including
24 any administrative costs.

1 (6) The applicant shall comply with all applica-
2 ble Federal and State laws (including regulations)
3 applicable to the cleanup and shall proceed in ac-
4 cordance with any voluntary cleanup program in
5 effect in the State.

6 (7) The applicant shall guarantee repayment of
7 the loan.

8 (8) The applicant shall use the loan solely for
9 purposes of cleaning up the environmental contami-
10 nation at the affected site, and shall return any ex-
11 cess funds to the Administrator immediately on a
12 determination by the Administrator that the cleanup
13 has been completed.

14 (9) The loan shall not be transferable, unless
15 the Administrator agrees to the transfer in writing.

16 (10) Such other terms and conditions that the
17 Administrator determines necessary to protect the
18 financial interests of the United States.

19 (d) **FEDERAL LIEN.**—

20 (1) **IN GENERAL.**—A lien in favor of the United
21 States shall arise on the contaminated property sub-
22 ject to a loan under this section. The lien shall cover
23 all real property included in the legal description of
24 the property at the time the loan agreement pro-
25 vided for in this section is signed, and all rights to

1 the property, and shall continue until the terms and
2 conditions of the loan agreement have been fully sat-
3 isfied. The lien shall arise at the time the United
4 States grants a loan under this section, and shall
5 not be subject to the rights of any purchaser, holder
6 of a security interest, or judgment lien creditor
7 whose interest is or has been perfected under appli-
8 cable State law, except that any interest held by the
9 United States as security for a loan under this sec-
10 tion shall be subordinate to any lien on the property
11 for taxes due on the property to a State or political
12 subdivision thereof.

13 (2) DEFINITIONS.—As used in this paragraph,
14 the terms “security interest” and “purchaser” shall
15 have the meaning provided the terms in paragraphs
16 (1) and (6), respectively, under section 6323(h) of
17 the Internal Revenue Code of 1986.

18 (e) ENFORCEMENT.—

19 (1) IN GENERAL.—If any person fails to comply
20 with any condition of a loan agreement entered into
21 pursuant to this section, the Administrator may re-
22 quest the Attorney General of the United States to
23 commence a civil action in an appropriate district
24 court of the United States to enforce the loan agree-
25 ment.

1 (2) JURISDICTION OF DISTRICT COURT.—The
2 district court shall have jurisdiction to enforce the
3 loan agreement and grant such relief as the public
4 interest and the equities of the case may require.

5 **SEC. 7. REGULATIONS.**

6 The Administrator shall promulgate such regulations
7 as are necessary to carry out this Act. The regulations
8 shall include the procedures and standards that the Ad-
9 ministrator considers necessary, including procedures and
10 standards for evaluating an application for a grant or loan
11 submitted under this Act.

12 **SEC. 8. ECONOMIC REDEVELOPMENT REVOLVING FUND.**

13 (a) IN GENERAL.—There is established in the Treas-
14 ury of the United States a trust fund to be known as the
15 “Economic Redevelopment Revolving Fund” (referred to
16 in this section as the “Revolving Fund”) consisting of
17 such amounts as may be appropriated to the Revolving
18 Fund, or transferred or credited to the Revolving Fund
19 pursuant to this section.

20 (b) TRANSFERS TO THE REVOLVING FUND.—

21 (1) TRANSFERS.—There are hereby transferred
22 to the Revolving Fund amounts equivalent to the
23 amounts received in the Treasury pursuant to sec-
24 tion 6(c)(4).

1 (2) MONTHLY TRANSFERS.—The amounts
2 transferred by paragraph (1) shall be transferred at
3 least monthly from the general fund of the Treasury
4 to the Revolving Fund on the basis of estimates
5 made by the Secretary of the Treasury. Proper ad-
6 justment shall be made in amounts subsequently
7 transferred to the extent prior estimates were in ex-
8 cess of, or less than, the amounts required to be
9 transferred.

10 (c) MANAGEMENT OF THE REVOLVING FUND.—

11 (1) INVESTMENT.—The Secretary of the Treas-
12 ury shall invest such portion of the Revolving Fund
13 as is not, in the judgment of the Secretary, required
14 to meet current withdrawals. The investments may
15 be made only in interest-bearing obligations of the
16 United States. For such purpose, the obligations and
17 may be acquired—

18 (A) on original issue at the issue price; or

19 (B) by purchase of outstanding obligations
20 at the market price.

21 (2) SALE OF OBLIGATIONS.—Any obligation ac-
22 quired by the Revolving Fund may be sold by the
23 Secretary of the Treasury at the market price.

24 (3) INTEREST ON CERTAIN PROCEEDS.—The
25 interest on, and the proceeds from the sale or re-

1 demption of, any obligations held in the Revolving
2 Fund shall be credited to and form a part of the
3 Revolving Fund.

4 (4) REPORT.—It shall be the duty of the Sec-
5 retary of the Treasury to hold the Revolving Fund
6 and (after consultation with the Administrator) to
7 report to Congress each year concerning—

8 (A) the financial condition and the results
9 of the operations of the Revolving Fund during
10 the preceding fiscal year; and

11 (B) the expected condition and operations
12 of the Revolving Fund for the five fiscal years
13 following the preceding fiscal year.

14 (d) EXPENDITURES FROM THE REVOLVING FUND.—
15 Amounts in the Revolving Fund shall be available, as pro-
16 vided by appropriation Acts, only for purposes of carrying
17 out the loan program established under section 6.

18 (e) AUTHORITY TO BORROW.—

19 (1) IN GENERAL.—There are authorized to be
20 appropriated to the Revolving Fund, as a repayable
21 advance, an amount equal to \$15,000,000 for each
22 of fiscal years 1994, 1995, 1996, and 1997.

23 (2) REPAYMENT OF ADVANCES.—

24 (A) IN GENERAL.—If the Secretary of the
25 Treasury determines that there are sufficient

1 funds available in the Revolving Fund to repay
2 a repayable advance, the Secretary shall trans-
3 fer from the Revolving Fund to the general
4 fund of the Treasury an amount equal to the
5 amount of a repayment plus interest (as deter-
6 mined by the Secretary under subparagraph
7 (B)).

8 (B) RATE OF INTEREST.—The amount of
9 interest on an advance made under this sub-
10 section shall be at a rate determined by the
11 Secretary (as of the close of the calendar month
12 preceding the month in which the advance is
13 made).

14 **SEC. 9. AUTHORIZATIONS OF APPROPRIATIONS.**

15 (a) VOLUNTARY CLEANUP PROGRAM.—There are au-
16 thorized to be appropriated to the Environmental Protec-
17 tion Agency, to carry out section 4, an amount not to ex-
18 ceed \$15,000,000 for fiscal year 1994, and \$7,500,000 for
19 each of fiscal years 1995 through 1997.

20 (b) SITE CHARACTERIZATION PROGRAM.—There are
21 authorized to be appropriated to the Environmental Pro-
22 tection Agency, to carry out section 5, an amount to ex-
23 ceed \$15,000,000 for each of fiscal years 1994 through
24 1997.

1 (c) ECONOMIC REDEVELOPMENT ASSISTANCE PRO-
2 GRAM.—There are authorized to be appropriated to the
3 Environmental Protection Agency, to carry out section 6,
4 an amount to exceed \$15,000,000 for each of fiscal years
5 1994 through 1997.

6 (d) AVAILABILITY OF FUNDS.—The amounts appro-
7 priated pursuant to this section shall remain available
8 until expended.

9 **SEC. 10. REPORT.**

10 (a) IN GENERAL.—Not later than 1 year after the
11 date of enactment of this Act, and not later than January
12 31 of each of the succeeding 3 calendar years thereafter,
13 the Administrator shall prepare and submit a report to
14 the Committee on Environment and Public Works of the
15 Senate and the Committee on Energy and Commerce of
16 the House of Representatives describing the achievements
17 of each grant or loan program established under this Act.

18 (b) CONTENTS OF REPORT.—The report shall, with
19 respect to the programs established under this Act, include
20 a description of—

21 (1) the number of grant and loan applications
22 received by the Administrator during the preceding
23 calendar year;

1 (2) the number of grants and loans approved by
2 the Administrator during the preceding calendar
3 year;

4 (3) with respect to each voluntary cleanup pro-
5 gram of a State that was the subject of a grant
6 under section 4—

7 (A) the purposes to which the grant
8 awarded to the State was applied; and

9 (B) the achievements of the program;

10 (4)(A) the affected sites identified by local gov-
11 ernments; and

12 (B) the status of the sites referred to in sub-
13 paragraph (A) regarding subsequent cleanup and
14 economic redevelopment;

15 (5)(A) the affected sites at which a cleanup was
16 initiated pursuant to the economic redevelopment as-
17 sistance program under section 6; and

18 (B) the status of the sites referred to in sub-
19 paragraph (A) regarding ongoing or completed
20 cleanup actions and economic redevelopment activi-
21 ties;

22 (6) the grants and loans disapproved during the
23 preceding year, and the reasons for disapproval;

24 (7) the amount of grants and loans made dur-
25 ing the preceding year, and an estimate of the total

1 cleanup costs incurred by parties receiving a loan
2 under the economic redevelopment assistance pro-
3 gram; and

4 (8) the number of applicants for grants and
5 loans that may be in need of financial assistance in
6 establishing voluntary cleanup programs, performing
7 site characterizations, and conducting cleanups to
8 achieve economic redevelopment under this Act.

9 **SEC. 11. FUNDING.**

10 (a) **ELIGIBLE COSTS DEFINED.**—For the purposes of
11 each grant and loan program established under this Act,
12 the term “eligible costs” shall include administrative and
13 nonadministrative costs.

14 (b) **NONADMINISTRATIVE COSTS.**—As used in this
15 section, the term “nonadministrative costs” shall include
16 the cost of—

17 (1) oversight for a cleanup by contractor,
18 owner, or prospective purchaser;

19 (2) identifying the probable extent and nature
20 of environmental contamination at an affected site,
21 and the preferred manner of carrying out a cleanup
22 at an affected site;

23 (3) each cleanup, including onsite and offsite
24 treatment of contaminants; and

1 (4) monitoring ground water or other natural
2 resources.

3 (c) ADMINISTRATIVE COST LIMITATION.—Not more
4 that 15 percent of the amount of a grant or loan made
5 pursuant to this Act may be used for administrative costs.
6 No grant or loan made pursuant to this Act may be used
7 to pay for fines or penalties owed to a State or the Federal
8 Government.

9 (d) OTHER LIMITATIONS.—Funds made available to
10 a State pursuant to the grant program established under
11 section 4 shall be used only for establishing or administer-
12 ing a voluntary cleanup program.

13 **SEC. 12. STATUTORY CONSTRUCTION.**

14 Nothing in this Act is intended to affect the liability
15 or response authorities of any other law (including any
16 regulation) for environmental contamination including the
17 Comprehensive Environmental Response, Compensation,
18 and Liability Act of 1980 (42 U.S.C. 9601 et. seq.), the
19 Solid Waste Disposal Act (42 U.S.C. 6901 et seq.), the
20 Federal Water Pollution Control Act (33 U.S.C. 1251 et
21 seq.), the Toxic Substances Control Act (15 U.S.C. 2601
22 et seq.), or title XIV of the Public Health Service Act,
23 commonly known as the "Safe Drinking Water Act" (42
24 U.S.C. 300f et seq.).

